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THE TAXPAYER ANTITRUST ENFORCEMENT ACT OF 1983 (ILLINOIS BRICK)

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST AND SECOND SESSION

ON

S. 915

A BILL ENTITLED THE "TAXPAYER ANTITRUST ENFORCEMENT ACT OF 1983"

JUNE 8, 1983 AND MAY 16, 1984

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THE TAXPAYER ANTITRUST ENFORCEMENT ACT OF 1983
(Illinois Brick)

WEDNESDAY JUNE 8, 1983

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 9:15 a.m., in room 226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Specter and Heflin.

Staff present: W. Stephen Cannon, chief antitrust counsel; Sally Rogers, senior antitrust counsel; Debbie Shupe, committee staff; Mary Louise Westmoreland, for Senator Specter; Jack Nash for Senator Laxalt, Alice R. Milder for Senator Grassley; Renn Patch for Senator Hatch; Doug Comer for Senator Dole; Tom Parry, for Senator Hatch; Bill Ichord for Senator Biden; Wes Howard for Senator Metzenbaum; Burt Wides for Senator Kennedy; Arthur Briskman for Senator Heflin; and Marge Baker for Senator Metzenbaum.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

Tomorrow marks the sixth anniversary of the *Illinois Brick* decision. Today, for the third time, the committee begins consideration of legislation intended to partially reverse *Illinois Brick*. S. 915, the "Taxpayer Antitrust Enforcement Act of 1983," would amend the Clayton Act to permit proprietary suits by the States on behalf of themselves and local governments, parens patriae suits, and by the Federal Government, all as indirect purchasers.

In addition, a proposed section of the Clayton Act would provide a pass-on defense for defendants, thus reversing the 1968 *Hanover Shoe* decision.

The fundamental arguments for and against this legislation have not changed over the years. Proponents point to the hesitancy of direct purchasers to sue their suppliers, as well as the ease with which illegal overcharges can be passed down the line of distribution. More particularly, the proponents of S. 915 focus on the need for States and units of local government to recover damages suffered as indirect purchasers, arguing that the ultimate beneficiaries will be the taxpayers. Opponents of *Illinois Brick* legislation argue that it will discourage meritorious suits, lessen antitrust deterrence, and impose intolerable evidentiary burdens on our judicial system.

When S. 1874, the first bill intended to reverse *Illinois Brick* decision, was introduced in 1977, the Court's decision was only 1 month old. Less than 2 years had passed when the next *Illinois Brick* bill, S. 300, was considered by this committee. Clearly on both of these occasions, insufficient time had passed to accurately analyze and assess the effects of the Court's decision. Now that 6 years have passed, the committee will hopefully be the recipient of more concrete data and measured thought regarding the issue of indirect purchaser suits.

At this point I wish to place the text of S. 915 in the record.

[The aforementioned follows:]

S. 915

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. (A) SECTION 4C(A) IS AMENDED BY ADDING NEW SUBSECTIONS (2) AND (3) AS FOLLOWS:

"(2) Whenever any State or political subdivision thereof is injured in its business or property by reason of anything forbidden by section 1 of this title the Attorney General of the State may sue on behalf of the State of any political subdivision thereof in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such State or political subdivision.

"(3) Actions brought pursuant to Section 4A of this Act or subsection (a)(1) or (a)(2) of this section may be maintained regardless of whether such natural person, State, political subdivision or the United States has purchased indirectly from the defendant.".

(b) Section 4C(a)(2) of the Clayton Act (15 U.S.C. 15c(a)(2) is redesignated as section 4C(a)(4) of the Clayton Act (15 U.S.C. 15c(a)(4)) and is amended by inserting in the first sentence after "paragraph (1)" the following: "or paragraph (2)".

SEC. 2. Section 4 of the Clayton Act (15 U.S.C. 15) is amended by adding at the end thereof a new section 4(I) to read as follows:

"In any action under section 4, 4A or 4C of the Clayton Act, the defendant shall be entitled to prove as a partial or complete defense to a damage action, in order to avoid duplicative liability, that, some or all of what otherwise would constitute plaintiff's damages has been passed on to others, who are themselves entitled to maintain an action or on whose behalf the Attorney General of the United States of of any State is entitled to maintain an action under sections 4A or 4C of this Act.

"Such defense shall be set forth as an affirmative defense in any responsive pleading of the defendant. The defendant shall set forth in such pleading, with as much particularity as is reasonable, the identity of those to whom the defendant asserts the plaintiff has passed on some or all of plaintiff's damages. For the purposes of Rule 19 of the Federal Rules of Civil Procedure, the Attorney General entitled to represent such person(s) pursuant to section 4A or 4C of this Act shall be deemed an indispensable party.".

The **CHAIRMAN**. Today, we have assembled a group of very distinguished witnesses from government, business and law.

We look forward to hearing their testimony.

At about 20 minutes to 10 I have to leave to go to the White House for a leadership meeting, and I believe Senator Specter will take over the hearing until I return.

We are very pleased this morning to have so many distinguished witnesses, and we start out with three of the Senate's ablest Members, three former Attorneys General. They are good advocates. They are good lawyers, and they are very able statesmen.

We are pleased to have them here, Senator Slade Gorton, Senator Warren Rudman, and Senator Jeff Bingaman.

Gentlemen, you may proceed in such order as you see fit.

STATEMENTS OF MEMBERS OF PANEL CONSISTING OF SENATOR SLADE GORTON FROM THE STATE OF WASHINGTON; SENATOR WARREN RUDMAN FROM THE STATE OF NEW HAMPSHIRE; AND SENATOR JEFF BINGAMAN FROM THE STATE OF NEW MEXICO

Senator **Rudman**. Thank you very much, Mr. Chairman.

It is certainly an honor for us to appear before your distinguished committee this morning.

As all of us are aware, a substantial history stands behind the bill, both judicial and congressional. It began with *Hanover Shoe Co.* v. *United Shoe Machinery Corp.*, a 1968 Supreme Court decision in which the Court ruled that a price fixer cannot escape liability simply by claiming that the injured plaintiff, a direct purchaser, passed on the price fixing costs to its own customers. The Court reasoned that all of the necessary parties were before the Court and it was irrelevant that the plaintiff had passed on illegal overcharges to others along the chain of distribution.

That led to the decision in *Illinois Brick Co.* v. *Illinois* in 1976. There the Court was faced with the *Hanover Shoe* pass-on situation in reverse—the State of Illinois and numerous local government entities were seeking damages from a price fixing manufacturer, alleging that middlemen had passed on the manufacturer's illegal profits in their prices. The case presented a real dilemma for the Court. As Justice Blackmun commented in his dissent, "If *Hanover Shoe* had not preceded this case, and were it not 'on the books,' I am positive that the Court today would be affirming perhaps unanimously, the judgment of the Court of Appeals" in favor of the plaintiffs. But, that was not to be. The Court wrestled with section 4 of the Clayton Act which then, as now, provides that any person—presumably including indirect purchasers—whose business or property is injured by activities forbidden in the antitrust laws may sue and recover three-fold for the damages sustained.

Furthermore, the Court had before it language from the Senate Judiciary Committee's report on the Hart-Scott-Rodino Act specifically disapproving Court decisions limiting recovery to direct purchasers. However, the Court had ruled in *Hanover Shoe* that they would not recognize indirect purchasers as injured parties. Therefore, in an effort to remain consistent, a majority of the Court chose to limit treble-damage actions to direct purchasers, and instead of recognizing prior congressional intent, invited Congress to change the Court's interpretation.

As this committee knows only too well, legislative proposals were offered during the 95th and 96th Congresses which would have retroactively reversed the *Illinois Brick* decision. They were unsuccessful, primarily because opponents argued that indirect purchasers are often so remote in the chain of distribution that a division of damages among the purchasers poses too great a burden on the courts.

I think this argument largely ignores the fact that our antitrust laws were not designed for expediency in the courts but to provide compensation for victims of anticompetitive behavior and to deter such behavior in the future. By limiting treble-damage actions to direct purchasers, I believe we are frustrating the objectives of our laws.

It is important to emphasize the impact of the *Illinois Brick* decision. An entire class of plaintiffs has been excluded from the protection of our antitrust laws and cannot seek compensation for their injuries. States, which rarely purchase directly, are forced to pay illegal overcharges which often amount to millions of dollars. And, since they cannot file suit, they are forced to make up their losses through tax increases. Very simply, Mr. Chairman, taxpayers are lining the pockets of price fixers.

Illinois Brick eliminated a tool by which State attorneys general could recover illegal profits. This is why the six former State attorneys general now serving in the Senate are still interested in exploring possible legislative proposals to help States protect taxpayers.

What we have done is to develop a middle ground which protects the rights of taxpayers, but also addresses the complexity of indirect actions in the courts. We have vastly reduced the complexity by limiting the number of potential plaintiffs and the class of persons that can recover. Senate bill 915 would limit actions to the United States and State attorneys general who would sue in their proprietary capacity to protect taxpayers, and as parens patriae consistent with the intent of the Hart-Scott-Rodino Act. Since State attorneys general work for the State and do not have a stake in the outcome of a case, there are no monetary motives, except on behalf of the State and its taxpayers. Second, the limited resources available to most State attorneys general place a barrier on the number of cases that might be brought. Therefore, it is very unlikely that precious resources would be gambled on tenuous cases.

Senate bill 915 further reduces complexity by limiting indirect purchaser suits, brought only by the attorneys general, to the last purchaser in the chain of distribution. Since the economic burden of antitrust violations is largely borne by the end consumer, our bill would insure their compensation. This solution would also exclude from judicial scrutiny all levels of distribution except for the direct and final purchaser. As the Court recognized in *Illinois Brick,* the offensive use of the pass-on by the last purchaser is a simpler situation. It does not involve complicated estimates of nonprice injuries that may be claimed by middlemen and is no more complicated than estimating what the purchase price would have been absent a violation. I believe this solution would realistically reduce the burden on courts without sacrificing the true victim of a price fixing conspiracy.

In my mind, this legislation represents a good solution to a difficult problem. It would permit States to recover for their taxpayers and their consumers, yet it limits the complexity and number of possible cases. Senate bill 915 would further the intent of our antitrust laws: to deter anticompetitive activity and compensate victims of price fixing conspiracies. In a day when States are finding it more and more difficult to find operating funds and Federal help is declining, we must insure that State enforcement officials have an effective tool to protect State coffers. It is time to balance the interests of the manufacturers with protection for our taxpayers.

As we deregulate and foster private initiatives, we should maintain our antitrust laws to insure that our markets remain competitive.

The **Chairman**. Thank you very much, Senator.

We appreciate your being here and presenting such a good statement.

Now we are glad to hear from the next attorney general, whichever one cares to go next.

Senator **Gorton**. Thank you, Mr. Chairman.

I am grateful to you for your willingness to listen to us today.

It is particularly gracious for you to allow me to speak because the subject I am going to speak about evokes groans by most Senators merely by being mentioned. I think you will appreciate by the time the hearings are completed, that the bill before you today is vastly different than previous proposals to overrule *Illinois Brick*.

During my 12 years as attorney general of Washington, I was intensely proud of the antitrust division of my office. Later on this morning, I am delighted to say, you will hear from the head of the antitrust department of that office during much of my tenure, Thomas Boeder. Tom is now a partner in the law firm of Perkins, Coie, Stone, Olsen & Williams. I am sure Tom will be able to discuss with you the specific concerns of the Court in the *Illinois Brick* case and how they would be impacted by S. 915.

It is no coincidence that this bill is entitled the "Taxpayer Antitrust Enforcement Act of 1983." No matter what terms you might use to describe the *Illinois Brick* decision, and no matter how you characterize the goals of our antitrust laws, the bottom line is that we are literally giving away tax dollars. Granted, the money is not given away voluntarily in the first instance, or by appropriation, but when Congress repeatedly refuses to give the Federal Government and the State and local governments the means by which to recoup tax dollars overspent as a result of price fixing and bid rigging, as far as I am concerned, we are giving the money away at that point. I will now ask the overly rhetorical question, "Can we afford to give these tax moneys away?" Of course, the answer to that question is we cannot.

In the past 2 years, 42 States have either enacted some form of tax increase [39] or cut their budgets. State and local governments have been told by Congress to assume more and more federally created responsibilities, all too often without the assistance of Federal dollars. Now I am not going to suggest to this committee that allowing the United States and State and local governments to recover damages resulting from price fixing will balance anyone's budget, but I will quote Senator Grassley who in addressing certain aspects of procurement policy said recently:

> With high deficits projected in the near future, we would be less than responsible as Members of Congress not [sic] to look at all avenues of potential savings for the American taxpayer and to reduce these unprecedented deficits.

Who among us wants to explain the continued application of the rule of *Illinois Brick* to governmental entities to a constituent who has just been informed that his or her State or Federal taxes are going up? Who among us wants to explain the logic of windfall recoveries to direct purchasers who have passed on all of their damages to a city, county, or State? If there is one among us who is so inclined, it is not this Senator from Washington.

I am sure there are some in the hearing room today who wonder why the opponents of the rule of *Illinois Brick* continue to argue their case to Congress.

At the risk of oversimplification, and unfortunately by way of reference to a subject matter which is at least as controversial as *Illinois Brick,* I would like to pose an analogy for the committee, which I think illustrates the sense of unfairness we perceive in the rule:

Let us suppose that I purchase a toaster oven at a department store. Due to a design defect, caused by the negligence of the manufacturer, it explodes in my kitchen and my arm is burned. How long would we stand for a rule of law that held: That I could not recover from the manufacturer for my injuries but, in order to deter the manufacturer from producing any more toaster ovens in a negligent manner, the department store could sue the manufacturer for three times my damages?

I think we would not keep such a rule of law for long. It is in this sense that the Court's decision in *Illinois Brick* does away with any notion of compensatory justice for the injured indirect purchaser and that offends many of us. When that injured party is the public treasury, I, at least, am offended all the more.

It is my strong sense of the unnecessary void in enforcement and the notion that our overburdened public treasuries are being made to subsidize windfall recoveries for direct purchasers who have passed on some portion of their damages to Government that prompts me once again to ask the Senate to consider the wisdom of the Court's decision in *Illinois Brick* as applied to some cases. I am not, however, unaware of the numerous and legitimate concerns of opponents to previous proposals. Therefore, this bill has been drafted as narrowly and as carefully as possible to continue to serve the Court's ends as reflected in *Illinois Brick,* but at the same time to allow some small degree of defense for the Nation's public treasuries. On the chance that some of the members of the committee have not had an opportunity to compare S. 915 to earlier *Illinois Brick* proposals, I should like briefly to outline what this bill would do and how it differs from its predecessors:

First, unlike prior bills, S. 915 would not allow all indirect purchasers to sue but rather only the United States, a State or a political subdivision of a State. Thus, the problems of unduly complicating a case are avoided because not every indirect purchaser in the chain of distribution would be entitled to recover, nor would damages be as difficult to apportion.

Second, any indirect action maintained on behalf of a State or political subdivision would be required to be maintained by the attorney general of the State. This aspect of the bill discourages nonmeritorious suits, problems associated with attorneys working on a contingency basis, and would limit the number of potential State or local plaintiffs to 52. This arrangement also makes it easier to avoid problems of multiple liability because notice requirements to potential plaintiffs are limited.

Third, the bill is limited to violations arising out of section 1, price fixing and bid rigging. Prior bills were not so limited.

Fourth, the defendent would be allowed to plead and prove that the plaintiff had passed on to the United States, a State or political subdivision some or all of the plaintiffs alleged damages. Multiple liability is thus avoided. Furthermore, if such a pass-on defense is asserted, the appropriate attorney general becomes an indispensible party for the purposes of rule 19 of Federal Rules of Civil Procedure.

Fifth, the bill is not retroactive.

Sixth, and finally, the bill clarifies that parens patriae cases were unaffected by *Illinois Brick*. Many witnesses before this committee, as well as members of the committee, have stated that in the past. Clearly, there is confusion among the lower courts in this issue as illustrated recently by a dismissal of the State's complaint in the case of *Massachusetts* v. *Mass. CR Inc.*, No. 60280 Massachusetts Supreme Court, Suffolk County, May 11, 1983.

I am not an economist and I will not dwell on the economic argument on both sides of the issue. I will ask, however, that a recent discussion paper by the Economic Policy Office of the Department of Justice be entered in the record following my testimony. I believe that paper demonstrates that the rule of *Illinois Brick* is far from perfect and there may well be room to fashion exceptions to the rule which will enhance rather than thwart its goals. I think S. 915 is an example of a solution to a valid criticism to *Illinois Brick*.

Members of the business community have suggested that the complaints of the States and the political subdivisions regarding the application of *Illinois Brick* can be solved by two mechanisms. First, the use of assignment clauses in State contracts, and second, State *Illinois Brick* override bills. These mechanisms are unsatisfactory for several reasons. Assignment clauses are as yet, not clearly valid under the *Illinois Brick* rule. As the Department of Justice discussion paper notes at page 20 at note 46:

> The Third Circuit has recently stated that "there appears to be no obstacle to the validity of assignments/of the right to sue/ * * *. Proof of the assignment bears no resemblances to attempts to ascertain the numbers of indirect purchases or overcharges in the *Illinois Brick* setting." In re *Fine Paper Litigation State of Washington*, 632 F. 2d 1081. This is the sole instance we have found permitting such transfers after *Illinois Brick*, and the extent to which the courts accept this reasoning remains to be seen. Landes and Posner argue that the assignment of the right to sue is likely to be difficult.

But more importantly, even assuming the validity of such clauses, they are only useful in a situation where the chain of distribution consists only of a price fixer, middleman, and the State. If the State purchases from someone who did not purchase directly from the manufacturer there is not likely to be any right to assign or any prior assignment which would result in such a right.

As to State legislation overriding *Illinois Brick*, I am slightly bemused by industry's position on the subject. First, industry will be the first to appear in the offices of State legislators urging that such legislation not be passed. Second, if they thought such legislation were to pass, they would support this bill in the interests of convenience. For instance, if Washington, Idaho, and Oregon all passed *Illinois Brick* override bills and 10 cities in each State seek to sue for injuries suffered by price fixing by the same, three companies, rather than having at most 3 lawsuits in 3 district courts with only 3 plaintiffs--the AG's—these companies could face 30 lawsuits with 30 different plaintiffs in 30 different State courts throughout the 3 States. How would the administration of justice be served by such a result?

The truth is, industry is no more ready to accept a suit on behalf of taxpayers if it arises out of State law than they are ready to accept it from Congress. So to the extent they claim assignment clauses and State law can handle the problem, this bill does the same thing but does so more efficiently.

In conclusion, Mr. Chairman, there are two brief points I should like to make. First, according to the annual report of the director of the Administrative Office of the United States Courts, a total of 1,148 antitrust cases were filed in the U.S. district courts in the 12 months ending June 1982. This is down 32 percent from 1977 and is the lowest total since 1970. I would be pleased if that figure indicated that antitrust violations were also down 32 percent since 1977, but I have grave doubts that that is the case.

Second, as we proceed this week to conference on a budget resolution that, no matter what the outcome, will admit to the largest deficits in our history, I think it would do us well to make note of the fact that at the time of the Court's decision in *Illinois Brick,* the United States had four indirect purchasers cases pending. Those cases involved potential recoveries on the order of $200 million. If the rule of *Illinois Brick* represented the possible forebearance of $200 million at that one moment in time, what will it mean to the Nation's Treasury over the next 20 years? I can think of several worthy discretionary programs that I would prefer to see receive that money rather than direct purchasers who have passed their damages on to the State or the price fixers or bid riggers themselves.

Finally, Mr. Chairman, I must ask what interests will be served by rejecting this compromise proposal? It will not be the interests of deterrence, it will not be the interests of judicial administration, and it will certainly not be the interests of the public treasuries of this Nation. The only interests which will be served by rejecting this bill are the interests of price fixers, bid riggers, and middlemen who are reaping windfall gains at the expense of the American taxpayer.

Thank you.

[The following discussion paper was received for the record:]

ECONOMIC POLICY OFFICE
DISCUSSION PAPER

Deterrence and Compensation Under the *Illinois Brick* Rule

by

Robert McGuckin & Russell Pittman

EPO 83-8 May 4, 1983

Economic Policy Office (EPO) Discussion Papers are the primary vehicle used to disseminate EPO research and comment outside the Antitrust Division. These papers are intended to regularly inform interested individuals and institutions of EPO's research program and to stimulate comment and criticism both within the Division and outside the agency on economic issues of interest to antitrust enforcement and policies.

This series of papers is open to a wide range of material including work on technical economic problems, reviews and comments on contemporary economic work and empirical and related research of use in policy analysis. In addition to the broad scope of material, titles in the *EPO Discussion Papers* will include both working papers and completed research scheduled for publication.

The analysis and conclusions of *EPO Discussion Papers* represent those of the authors and do not necessarily reflect the views of the Department of Justice. Information on the EPO research program and single copies of *EPO Discussion Papers* may be obtained by writing to Robert McGuckin, Assistant Director for Research, EPO, Antitrust Division, U.S. Department of Justice, Old Star Building, Rm. 10119, 414 11th Street, N.W., Washington, D.C., 20530. Comments on specific papers may be addressed directly to the authors at the same address.

In 1977, the Supreme Court ruled in *Illinois Brick Co. v. Illinois* [1] that in most circumstances only the direct customers of a price-fixer could successfully sue for damages under section 4 of the Clayton Act. [2] This decision has been labelled as barring "offensive pass-on," since it prevents an indirect customer of the product—for example, the final consumer of a product whose price was illegally fixed by the manufacturer but which was sold first to a wholesaler and then to a retailer—from suing for damages on the grounds that the price differential was "passed on" by the direct purchaser to the indirect.

The decision was seen by the Court as consistent with the reasoning used in its earlier decision in *Hanover Shoe v. United Shoe Machinery Corporation*. [3] That decision has been labelled as barring "*defensive* pass-on", since it prevents a firm accused of price-fixing by a direct customer from replying that the plaintiff suffered no damages because it "passed on" the higher price to *its* customers.

These two decisions have received sharply contrasting assessments in the antitrust literature. Leading those who have sided with the Court have been

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Robert McGuckin is Assistant Director for Research and Russell Pittman is Economist in the Economic Policy Office, Antitrust Divison, U.S. Department of Justice. They are grateful to Matthew Hyle, Jon Joyce, Marius Schwartz, Marilyn Simon, and Larry White for their comments and suggestions. The views expressed here are those of the authors and do not necessarily reflect the views of the Department of Justice.

[1] 431 U.S. 720 (1977).

[2] 15 U.S.C. §2 (1976). The term "price-fixing," as used in this paper, is meant to include a whole range of collusive activities (e.g., bid-rigging).

[3] 392 U.S. 481 (1968).

Professors William Landes and Richard Posner, 4/ who have argued, first, that the *Illinois Brick* rule is superior from the standpoint of *deterrence*, because it places the returns from the detecting of price fixing in the hands of the party in the best position to do so, and, second, that, although they view deterrence as the most important criterion, the rule is, nonetheless, acceptable from the standpoint of *compensation*, because the direct customer will treat any damage award as a cost saving and pass it along to the indirect customers. Landes and Posner further argue in support of the Court's contention that any judicial attempt to apportion the damages of a price fix among direct and indirect customers would involve nightmarish expeditions into the realms of econometric estimation. 5/

On the opposite side of the fray are Professors Robert Harris and Lawrence Sullivan, 6/ who have focused most of their analysis on the third of the

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4/ Landes and Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. CHI. L. REV. 602 (1979) (hereafter "Landes and Posner article"); *The Economics of Passing On: A Reply to Harris and Sullivan*, 128 U. PA. L. REV. 1274 (1980) (hereafter "Landes and Posner reply").

5/ The Landes and Posner proposition draws heavily upon the following passages from the *Illinois Brick* decision: "The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing the price and output decisions 'in the real economic world rather than an economist's hypothetical model.'. . . [A]ttention to 'sound laws of economics' can only heighten the awareness of the difficulties and uncertainties involved in determining how the relevant market variables would have behaved had there been no overcharge." 431 U.S. 720 (1977), at 731-732 and 743, citing 392 U.S. 481 (1968), at 492-493.

6/ Harris and Sullivan, *Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979) (hereafter "Harris and Sullivan article"); *Passing On the Monopoly Overcharge: A Response to Landes and Posner*, 128 U. PA. L. REV. 1280 (1980) (hereafter "Harris and Sullivan reply").

Landes and Posner positions listed above. Harris and Sullivan contend that economic theory and management science allow one to make certain strong prior assumptions concerning the extent of passing on which takes place in particular settings. Furthermore, they argue that these prior assumptions are refutable with a small, well-defined set of findings. Harris and Sullivan argue in addition that the Illinois Brick rule may harm deterrence if direct purchasers are hesitant to jeopardize relationships with their suppliers and that, under the rule, those indirect purchasers damaged by a price fix will not be compensated, since the direct purchasers will treat a damage award as a windfall gain rather than as a price reduction and so will not pass it along to the indirect purchasers.

A separate issue arising from Illinois Brick and Hanover Shoe, not addressed explicitly by either Landes and Posner or Harris and Sullivan, concerns the scope of exceptions to the Illinois Brick rule. The decision in Illinois Brick suggests an exemption for those indirect purchasers operating under the terms of

> a pre-existing cost-plus contract. In such a situation, the [direct] purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. 7/

The decision is not specific, however, as to whether this exception is to be interpreted broadly or narrowly--whether, in particular, the "functional equivalent" of a cost-plus contract is acceptable--and the courts have varied

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7/ 431 U.S. at 736. A footnote indicates another possible exception: the situation "where the direct purchaser is owned or controlled by its customer." Ibid. at 736, fn. 16.

in their reading. 8/ Those commentators who have addressed this issue are likewise divided. 9/

This paper has two principal objectives. First, we seek to clarify the basic considerations involved in the general controversy concerning Illinois

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8/ Consider, for example, the opinion in Mid-West Paper Products Co. v. Continental Group, Inc.:

> The supermarket plaintiffs submit that this exception should be interpreted expansively so as to permit recovery even if the pre-existing cost-plus contract does not fix the quantity of goods to be purchased. . . . Also, plaintiffs suggest, the exception should be stretched to include informal arrangements and patterns of cost-plus pricing. Nevertheless, we are bound by the clear dictate of Illinois Brick and may not extend the exception beyond the limited circumstances recognized by the Supreme Court. 596 F. 2nd 573 (3d Cir. 1979), at 577, fn. 9.

Continuing:

> [T]he position taken by the supermarkets . . . is that it is sufficient for them to prove that there were pre-existing cost-plus arrangements, and that it is not necessary . . . to prove fixed quantities of goods. This stance is manifestly not in accordance with the dictate of Illinois Brick. Ibid. at 580.

Compare this with the opinion in In re Beef Industry Antitrust Litigation:

> [T]he Court meant the scope of the exception to be narrow, but it did not imply that only cases involving cost-plus contracts qualify. Commentators have observed that Hanover Shoe and Illinois Brick permit the assertion of passing-on in situations that are the functional equivalent of the cost-plus contract case. . . . When the impact of an overcharge on a middleman's pricing decisions can be . . . determined, the uncertainties involved in resorting to general economic theorems are avoided. . . . Functional equivalence is not lost simply because the proponent of passing-on theory cannot demonstrate that the middleman suffered no loss in volume as the result of raising the price to his customers. 600 F. 2d 1148 (5th Cir. 1979), at 1163-64.

9/ Compare Note, A Legal and Economic Analysis of the Cost-Plus Contract Exception in Hanover Shoe and Illinois Brick, 47 U. CHI. L. REV. 743 (1980), and Note, Antitrust Law - In Re Beef Antitrust Litigation: A Crack Appears in the Illinois Brick Wall, 1981 WIS. L. REV. 185 (1981) with Note, Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation, 63 CORNELL L. REV. 309 (1978).

Brick, pinpointing and evaluating relevant empirical issues. The importance of the *Illinois Brick* rule and the obvious lack of agreement on its usefulness prompt our inquiry. We find that there are many unanswered questions with respect to the optimality of the rule which suggest the need for further work on its effects. Second, we examine what are potentially important exceptions to the *Illinois Brick* rule. Under the assumption that the rule will continue to be supported by the Court and Congress, this portion of the paper identifies several situations where indirect purchasers are likely to be equal or superior enforcers of the law *and* where the costs of processing their damage claims are likely to be small.

We proceed as follows. First we discuss the deterrence issue, where we argue that a rule which vests the right to sue for damages in direct purchasers is probably theoretically superior from the standpoint of search costs to a rule which also provides for the damage claims of indirect purchasers, but that *both* are imperfect from the standpoint of deterrence as a whole. In fact, we present arguments that the *Illinois Brick* rule may provide either too little or too much deterrence.

Second, we discuss the compensation issue. There we argue that both the Landes and Posner and Harris and Sullivan analyses are unsatisfactory because they both ignore the uncertain nature of the damage award. However, our analysis supports the conclusion of Harris and Sullivan that under *Illinois Brick*, direct purchasers are likely to treat any damage award as a windfall and so are unlikely to pass it along to indirect purchasers.

Third, we discuss the issue of analytical tractability. We believe that Harris and Sullivan make a useful and valid point in delineating the likely and unlikely configurations of supply and demand conditions; however, we suggest that they overstate their case. On the other hand, we also suggest that while Landes and Posner and other commentators may be correct with respect to certain aspects of the additional legal costs imposed by allowing indirect purchasers to sue for damages, their discussion is not satisfactory. We argue that, at the least, their implicit suggestion that Illinois Brick answers the problems raised by the existence of multiple claimants is not convincing.

Finally, we consider the cost-plus exception to the Illinois Brick rule. There we argue that the benefits accruing from a liberal interpretation of exceptions to the rule based on the cost-plus criterion may be substantial. In particular, in those situations where the substantial legal costs which Landes and Posner associate with the computation of passed-on damages are likely to be absent, exceptions to the rule seem clearly warranted.

1. Deterrence

Landes and Posner argue, with considerable justification, that there are reasons to believe that a direct purchaser is a more efficient--i.e., lower cost--private enforcer of the antitrust laws than is an indirect purchaser. The principal reason is the proximity of the direct purchaser to the supplier.

> The direct purchaser deals directly with the violator, and probably with his competitors, and he is therefore in a better position than a more remote purchaser to detect a conspiracy or other antitrust violation. The remote purchaser may not know that a price increase to him is attributable to a price increase by a remote supplier, and even if he does know, he will find it difficult to discover the reasons for the remote supplier's price increase. 10/

The second sentence would be especially true if the direct purchaser has

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10/ Landes and Posner article, at 609.

transformed the price-fixed product in some way—for example, if the price-fixing supplier sells an industrial raw material and the direct purchaser is a manufacturer.

Harris and Sullivan argue in response to this point that direct purchasers may be hesitant to bring suit for fear of disrupting long-standing supplier relationships. 11/ Landes and Posner respond that

> any forbearance by the direct purchaser to sue will be compensated. The supplier must pay something to bind the direct purchaser to him and this payment is, functionally, a form of antitrust damages. 12/

This is merely another way of saying that any unlawful exercise of market power by the seller will be reflected in the demand curve which it faces for its product. If part of this power is taken in the form of a reduced retaliation for price-fixing suits, then that part will be taken at the expense of the power to raise price.

This may be an overly sanguine view. We shall argue below, in the "Compensation" section, that so long as knowledge of the future is imperfect, part of any damage award--and perhaps a large part—is a windfall. To the extent that it is a windfall, then, as Harris and Sullivan correctly argue, 13/ the damage award is not included in the supply (or demand) curve of the direct purchasers. In that case, the tradeoff involving reduced retaliation is not included either, and the fear of supply disruption may be a valid one.

11/ Harris and Sullivan article at 352.

12/ Landes and Posner reply at 1278.

13/ Harris and Sullivan article at 298-299, especially fn. 67.

The magnitude of the "retaliation" effect, and, thus, the relative superiority of the Landes/Posner and Harris/Sullivan arguments, is an empirical question which requires further analysis. The Harris/Sullivan response does not appear to undermine the Landes/Posner contention that direct purchasers may be better able to detect violations than indirect purchasers. Yet, by example, their response does suggest that in stressing the superiority of direct purchasers in the search for violators, Landes and Posner do not adequately focus on the broader issue of the incentives to sue violators.

Consider the statement by Landes and Posner that under the rule, direct purchasers have "adequate incentives to bring suit and prosecute it to judgment." 14/ If this statement is intended to refer to adequacy in the sense of an optimal enforcement strategy--and it appears to be so intended--we would argue that it is likely to be incorrect. In fact, there seem to be reasons to believe that the rule provides either too little or too much incentive for direct purchasers to sue, and where these two effects balance is a matter which requires considerable further research.

Why may the rule provide too little incentive to sue? Recall the argument of Landes and Posner that indirect purchasers are poor enforcers of the law because they may be so numerous that potential damage awards are small and meritorious suits are not brought. In fact, there seems no reason not to apply this argument to direct purchasers as well. Certainly it is a frequent occurrence that in a successful price-fixing conspiracy, a small number of sellers faces a large number of buyers. In such a situation, these buyers may

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14/ Landes and Posner article at 608, emphasis added.

encounter the same problem in trying to bring suit that Landes and Posner describe as encountered by indirect buyers: their numbers may be so large that the expected share of the damage settlement for any one buyer is less than the expected costs of litigation. 15/

Why, on the other hand, may the rule provide too much incentive to sue? The Landes and Posner argument concerning the superiority of direct purchasers rests heavily on the issue of search costs, and search costs would seem to be an important factor in cases of concealed price-fixing. If the activity is unconcealed or revealed by another enforcer, then direct purchasers are unlikely to possess a substantial search-cost advantage over indirect purchasers.

It seems unlikely that the set of cases for which direct purchasers hold superior search capability is large, because the Antitrust Division and state attorneys general bring all criminal price-fixing suits. In most cases, these criminal suits represent attacks on concealed activities. This means that, in practice, the search-cost advantage of direct purchasers is likely to be small in concealed cases. The importance of private plaintiffs for the enforcement of the law must then be in the challenging of unconcealed activities and in bringing "follow-on" damage suits in those instances where antitrust authorities reveal the existence of a claim. In the case of challenging unconcealed activities, however, one might argue that the trebling of damages

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15/ Conversely, there may be many situations in which the number of indirect purchasers is small. (See Section 4, below, for an example.) In such cases the problem with Illinois Brick is not necessarily that it provides too little incentive for direct purchasers to sue; it is rather that the decision removes the ability to sue from the possession of a party perfectly willing to exploit it.

already provides excessive incentive to sue. 16/ If that is the case, one might prefer an Illinois Brick rule which reduced the incentive for private parties to sue.

These points may be answered in various ways. We argue below that the problem of too little incentive by direct purchasers may be overcome at least in part by a liberal judicial interpretation of the stated exceptions to the Illinois Brick rule. Conversely, one may argue that if the trebling of damages causes excessive deterrence, then the trebling issue should be addressed directly; it is not the function of the Illinois Brick rule to set right all the wrongs in antitrust enforcement.

To recapitulate: Landes and Posner are probably correct in arguing that, from the standpoint of private search costs, the Illinois Brick rule is well-designed as a deterrent to price fixing, particularly when compared with a rule which includes all indirect purchasers. We have argued, however, that search costs are far from the whole story, in part because public enforcers exist and undertake enforcement in precisely those areas where the search cost advantages of direct purchasers are greatest, and in part because the incentive to bring suit once a violation is detected is at least as important a factor in deterrence. Furthermore, depending on the nature of the violation and the market in which it takes place, the Illinois Brick rule may provide too little or too much incentive for private parties to sue for damages. In

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16/ See R. POSNER, ECONOMIC ANALYSIS OF LAW (1977) at 235, where it is argued that a major justification for multiplying criminal damage awards is the concealability of the crime, which makes the probability of detection less than one. See also W. Breit and K. Elzinga, Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages, 17 J. LAW & ECON. 329 (1974).

short, the evaluation of the rule from the standpoint of deterrence requires substantial further study.

2. Compensation

Landes and Posner argue that, after Illinois Brick, indirect purchasers will continue to receive compensation for price-fixing in spite of their reduced abilities to sue, because direct purchasers will treat the expected value of future damage awards as a cost reduction and will pass this reduction along in the form of lower prices. 17/ Harris and Sullivan, on the other hand, contend that a damage award is treated by direct purchasers as a windfall gain—whether or not it is anticipated—and that as such it has no effect on the marginal costs incurred or prices charged by direct purchasers. 18/

We believe that the conclusion reached by Landes and Posner is incorrect. We believe that the conclusion reached by Harris and Sullivan is correct, but that the reasoning by which it is reached is incorrect. 19/

In order to examine the (theoretical) degree to which a damage award is passed along it is necessary to expand upon a point made in passing by Landes

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17/ Landes and Posner article at 605-606. As noted earlier, Landes and Posner consider the issue of compensation to be of significantly lesser importance than the issue of deterrence in the evaluation of the Illinois Brick rule. (Ibid. at 605) We concur with this judgment and with the reasoning which supports it.

18/ Harris and Sullivan article at 298-299, especially fn. 67.

19/ In particular, Harris and Sullivan are clearly incorrect in arguing that an award which is fully anticipated will not be passed along at all; so long as the value of damages depends upon the number of units purchased, an anticipated damage award must affect both marginal costs and prices.

and Posner. They note in the body of their article that indirect purchasers

> obtain, in the form of lower prices, a benefit equivalent to the anticipated value of the antitrust damage claims that they are denied, _discounted for the uncertainties of recovery_. 20/

They proceed to point out in a footnote that "our discussion implicitly assumes that purchasers are risk neutral." 21/

Uncertainty is an important element of this analysis, because the degree of uncertainty associated with a future damages award at a time when no price-fixing case has even been filed--at the time of the transaction between the producer and the direct customer--must be large.

Let us consider the ability to sue for damages from price-fixing as a risky asset. Under _Illinois Brick_ this asset cannot be traded; it rests exclusively with the direct purchaser. 22/ Competition among direct purchasers should result in the passing on of the value of this asset to indirect purchasers.

But what is the value of this asset? It is not, as Landes and Posner admit, simply the expected value of the damage award (where "expected value" is defined as the value of the award multiplied by the probability that it will be received). Even this value may be small enough, given the apparently low _ex ante_ probability of a damage award, to be considered the functional

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20/ Landes and Posner article at 605, emphasis added.

21/ _Ibid_. at 606, fn. 17.

22/ But see section 4 for possible exceptions.

equivalent of zero. 23/ The expected value of the award must be discounted for the passage of time, and this would usually reduce the award by an additional nontrivial amount. 24/ In addition, this discounted expected value must be discounted according to the degree of risk aversion possessed by the direct purchasers. 25/ The result of the combination of these three discount factors is likely to be a very large reduction indeed in the *ex ante* value of the future award.

There may be a more fundamental point to consider here, however. Landes and Posner are clearly assuming that the *ex post* value of a typical damage award bears a strong, observable relationship to the amount of the price increase associated with the fix and the quantity of the price-fixed good sold. It is at least arguable that, "in the real world rather than an economist's hypothetical model," 26/ the size of a typical damage award may be affected more by liability or by chance than by the value of the damages actually incurred. Certainly one could be forgiven for forming this

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23/ It is in this sense that Harris and Sullivan may be correct in arguing that even an anticipated damage award is not passed on from direct to indirect purchasers.

24/ For example, a discount rate of 10 percent and the passage of three years would reduce the expected value of the award by 25 percent.

25/ This is a standard result in the analysis of economic behavior under uncertainty. See, for example, H.R. VARIAN, MICROECONOMIC ANALYSIS (1978) at 108-111; W. NICHOLSON, MICROECONOMIC THEORY (2nd ed., 1978) at 156-159. For a cogent discussion in the context of antitrust damages, see Frank Easterbrook, William Landes, and Richard Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. LAW & ECON. 331 (1980) at 351, fn. 49.

26/ 392 U.S. 481 at 492-493.

impression as a result of Berkey Photo, Inc. v. Eastman Kodak Co. 27/ or MCI Communications Corp. v. AT&T Co. 28/ If this is the case, then the primary problem with the position taken by Landes and Posner is not that large discount factors must be applied to future awards of foreseeable magnitude; it is that, in addition, the magnitude of the future awards is unforeseeable.

It is difficult to escape the conclusion that little or none of the damages award will be passed from direct to indirect purchasers under the Illinois Brick rule.

3. Analytical Tractability

Let us move from considering the passing on of damages to the passing on of illegal price increases. As noted above, 29/ a principal stated reason for the Court's decisions in Hanover Shoe and Illinois Brick was an aversion to the complications perceived as inherent in an attempt to apportion price increases among several parties in a chain of purchasers--in other words,

> [a] perception that the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings. . . . 30/

Landes and Posner agree with this evaluation:

> We are fearful of the increase in the costs, time, and uncertainty involved in antitrust enforcement if the passing-on issue is injected into

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27/ 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

28/ 1982-83 Trade Cas. ¶65,137 (7th Cir. 1983).

29/ See fn. 5/, above.

30/ 431 U.S. at 732. See also Ibid. at 725, fn. 3, citing 392 U.S. at 492-493.

suits by direct and indirect purchasers. 31/

Their arguments in support of this position concerning the difficulty of estimating elasticities of supply and demand in particular markets with any degree of exactness are persuasive. 32/ Exactness is rare in economics. However, Harris and Sullivan are also persuasive in arguing that while a formidable array of supply and demand elasticity configurations are *possible* in particular markets, one configuration is much more *probable* than others in markets where cartels are successful: demand is inelastic relative to supply. 33/ Arguably, under these circumstances, most of an overcharge is likely to be passed on from direct to indirect purchasers. 34/

The problem with the Harris and Sullivan argument is that its predictions concerning demand elasticities are based upon the assumption that the cartel being prosecuted was in a market conducive to cartel formation. However, price-fixing is a *per se* violation of the law even if the fix is unsuccessful,

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31/ Landes and Posner article at 619.

32/ Recent research in applied microeconomics has demonstrated clearly that elasticity estimates are not only subject to problems owing to data quality and availability; they may also vary considerably according to the particular measurement technique chosen by the researcher. See, for example, J.R. Moroney and J.M. Trapani, *Alternative Models of Substitution and Technical Change in Natural Resource Intensive Industries*, in E.R. BERNDT and B.C. FIELDS, eds., MODELING AND MEASURING NATURAL RESOURCE SUBSTITUTION (1981): "Our findings provoke a substantive methodological question, since our inferences concerning . . . [elasticities] are often sensitive to model specification." (p. 63) *See also* D.K. Guilkey and C.A.K. Lovell, *On the Flexibility of the Translog Approximation*, 21 INTL. ECON. REV. 137 (1980), and J.M. Griffin, *The Approximation Characteristics of Generalized Functional Forms: Results from Pseudo-Data Experiments*, in V.K. SMITH, ed., ADVANCES IN APPLIED MICROECONOMICS, v. 2 (1982).

33/ Harris and Sullivan article at 283-292.

34/ *Ibid*. at 290.

short-lived, or not lucrative. 35/ What happens in those markets where the Harris and Sullivan presumptions are incorrect--where, for example, demand is elastic and supply is inelastic? In such a market economic theory would predict little or no pass-on.

The first response--likely the response of Harris and Sullivan--is that they have allowed for this possibility in their list of "factors" which may be introduced as evidence that complete passing on has not occurred in a particular instance. 36/ This list does indeed include considerations of demand and supply elasticities. However, as noted above, and unchallenged by Harris and Sullivan, such elasticities are in practice difficult to estimate. In fact, the difficulty of estimation is the rationale for the theoretical exercise of Harris and Sullivan in the first place. Thus, it must be conceded that there will be a certain number of cases where demand and supply elasticities are *incorrectly* assumed to permit complete passing on.

The second response, relevant to the first, is that the configuration of elasticities affects not only the degree of pass-on but also the size of the

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35/ In fact, some would argue that formal collusion is necessary only when the structural conditions for informal collusion are absent, so that one would expect to find price-fixing only in markets with relatively *elastic* demand. See, for example, Robert E. Smith, *Toward a Broader Concept of Competition Policy*, in John V. Craven, ed., INDUSTRIAL ORGANIZATION, ANTITRUST, AND PUBLIC POLICY (1983): "Industries most able to coordinate effectively can use the more informal and less direct techniques, thereby avoiding detection or escaping prosecution because the law does not reach such means. On the other hand, those least able to collude effectively are restricted by transaction costs to the more formal and direct techniques. These tend to be more vulnerable legally." (p. 98) See also Peter Asch and J.J. Seneca, *Is Collusion Profitable?* 58 REV. ECON. STAT. 1 (1976) and Arthur G. Fraas and Douglas F. Greer, *Market Structure and Price Collusion: An Empirical Analysis* 26 J. IND. ECON. 21 (1977).

36/ Harris and Sullivan article at 315-320.

actual damages from the conspiracy 37/ and that if the industry demand curve is flat the damages imposed by a price-fixing agreement are likely to be small. This suggests that the problem noted in the preceding paragraph of a misallocation of damages between direct and indirect purchasers is likely to involve (relatively) small dollar amounts. The difficulty with this response is that the estimation of damages is also fraught with error, so that a damage award may be calculated to be large when damages were in fact small. In this case, however, the damage award is a windfall wherever it goes. 38/

The upshot of this discussion is that while Harris and Sullivan may overstate the universality of their findings, the magnitude of judicial error in following the Harris and Sullivan dictates is likely to be small. If it is large, the problem lies with the estimation of damages, not with their allocation.

Nonetheless, to argue that judicial error is likely to be small does not directly address the point, also emphasized by Landes and Posner, that the inclusion of indirect purchasers in damage calculations would impose a potentially severe burden on the courts as they attempted to avoid the twin dangers of multiple recovery and inadequate recovery. 39/ While we agree that the court costs associated with allowing indirect purchasers to sue are nontrivial, we also recognize that they can be handled in many situations. Multiple claimants are a common feature of much litigation, not just antitrust.

37/ *Ibid.* at 285.

38/ See our discussion in the Compensation section, above.

39/ Landes and Posner article at 620.

We believe that there are at least two points which have not been adequately discussed in connection with the issue of analytical tractability. First, the existence of multiple claimants should not in principle affect the size of damage awards. 40/ Damages before trebling are generally limited to that level associated with simple "contract" damages. 41/ That is, the total number of units sold by the price-fixers is multiplied by an "overcharge" factor, the difference in the price that was paid and the price that would have prevailed absent the fix.

Illinois Brick reflects a simple method of allocating this fixed pie which eliminates much of the potential for multiple claims difficulties: each direct purchaser can sue only for damages based on its own easily observed purchases. Introducing indirect purchasers raises the possibility that varying verdicts could impose multiple liability on defendants: both indirect and direct purchasers could collect damages for the same units sold by the price fixer.

Thus, to its supporters Illinois Brick provides a method for ensuring that total damages are not increased beyond the level of trebled simple contract damages. 42/ Landes and Posner clearly have the question of multiple liability in mind when they argue that "To overrule Illinois Brick is to

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40/ The size of the damages should not be affected by the parties involved unless one party is the Federal Government, which cannot sue for treble damages.

41/ See J. Guilfoil, Damage Definition in Private Action Suits, NOTRE DAME LWYR. 647 (1967). The level of damages which should be imposed upon a price-fixer to achieve proper deterrence is not easily assessed. See footnote 16 and the surrounding text for a discussion of some of the factors involved.

42/ Another method of achieving this goal would be the vesting of the right to sue for damages in a single entity.

overrule Hanover Shoe." 43/ However, their statement that the alternative to Illinois Brick—the consolidation of all claimants into a single group for the purpose of allocating damages—would be too cumbersome and costly to be effective is not obvious to us. It may be better to alter the case consolidation principles rather than to support Illinois Brick, particularly in light of some of the problems raised by Illinois Brick in the areas of deterrence and compensation as discussed above.

A second point, and one which provides the impetus for the next section, is that even if Illinois Brick is generally meritorious, there are many situations in which the costs of allocating damages between direct and indirect purchasers are small. We view these cases as appropriate exceptions irrespective of one's empirical views on the issues of deterrence and compensation.

4. Exceptions to the Illinois Brick Rule

As noted earlier, the Illinois Brick decision states as an exemption from its prohibition of the use of offensive pass-on, those cases where the direct purchaser of the price-fixed good sells to the indirect purchaser under the terms of a "pre-existing cost-plus contract." 44/ This exemption has been interpreted either narrowly or broadly by various courts, 45/ and this is not the place, nor are we the authors, to seek to fathom the true intentions

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43/ Landes and Posner article at 603.

44/ 431 U.S. at 736.

45/ See fn. 8 above for examples of two opposing views. For a discussion of these and other decisions, see Note, A Legal and Economic Analysis of the Cost-Plus Exception in Hanover Shoe and Illinois Brick, supra fn. 9.

of the Illinois Brick Court. Nevertheless, there are certain aspects of economic efficiency which may provide guidance in how this exemption ought to be interpreted.

Consider the right to bring suit to recover price-fixing damages as a property right. (This, of course, is the viewpoint taken by Landes and Posner and discussed in our "Compensation" section above.) Under Illinois Brick, this right is vested in the direct purchasers of the price-fixed good. If this right could be easily transferred in advance of any detected price fixing, then no special exemptions such as a cost-plus contract would be needed. But if it is costly to transfer these rights or no separate contracting regarding the right to sue is permitted, then inefficiencies are likely to result. 46/ As Professor Posner has noted,

> The creation of exclusive rights is a necessary rather than sufficient condition for the efficient use of resources. The rights must be transferable. 47/

The reasoning behind this finding is straightforward. As in the case of other property rights--indeed, as in the case of other economic goods--the

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46/ The Third Circuit has recently stated that "there appears to be no obstacle to the validity of assignments [of the right to sue]. . . . Proof of the assignment bears no resemblance to attempts to ascertain the numbers of indirect purchases or overcharges in the Illinois Brick setting." In re Fine Paper Litigation State of Washington, 632 F.2d 1081 (1980), at 1090. This is the sole instance we have found permitting such transfers after Illinois Brick, and the extent to which the courts accept this reasoning remains to be seen. Landes and Posner argue that the assignment of the right to sue is likely to be difficult. (Landes and Posner article at 625)

47/ R. POSNER, ECONOMIC ANALYSIS OF LAW (1977) at 9. Of course, even in those situations where a property right is itself not transferable the value of the right may be transferable. To the extent that the ex post value of a damage award is passed on, then the value of the property right has been transferred. However, as we argued earlier, the extent of this pass-on is likely to be small.

right to sue for price-fixing damages may be valued more highly by one party than by another. If the right is owned by the party with the lesser valuation, a transfer may be mutually beneficial.

Consider an apposite example. A brick manufacturer, selling at artificially high prices, does business directly with dozens of contractors. A large number of these contractors sell either directly or through other contractors to agencies of the state of Illinois. The large number of direct purchasers may render the prospective size of a damage award to any individual contractor so small that the incentive to sue is lost. 48/ On the other hand, the diverse final purchasers are represented by a single party, the state attorney general, and any damage award accrues to a single party only, the state.

Because the state as plaintiff may thus have a greater incentive to sue and have lower costs of suing than have the contractors, one would expect the state to be willing to purchase from the contractors the right to sue the brick manufacturer. If a bargain were successfully completed, at least one side would be better off and one no worse off; in addition, the price-fixing manufacturer would be more likely to be sued. To the extent that the right to sue is not transferable both efficiency and deterrence are reduced.

The point of the foregoing example is not, of course, that indirect purchasers will always be superior plaintiffs to direct purchasers in price-fixing cases. The point is rather that the Illinois Brick rule, as it

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48/ "The paradox of less enforcement with more potential enforcers is simply an application to antitrust enforcement of the well-known problem of external economies. Each party's expenditure on enforcement confers a benefit on the other parties, but no one has an incentive to take account of this external benefit in determining the level of his own expenditures." Landes and Posner article, at 624.

currently stands, surely causes a loss of efficiency in some instances, and one should seek to avoid this loss if there are ways to do so.

Consider again the exemption in Illinois Brick for cost-plus contracts. At first blush one might think that this exemption removes any problems, since any direct purchasers and indirect purchasers wishing to transfer the right to sue could simply sign such a contract. The problem with this solution, of course, is that cost-plus contracts are entered into in order to take account of a variety of risks and computational difficulties, the greatest of which is often technological and the least of which is probably price-fixing by input suppliers. If these other risks are not desired to be transferred, it must be a rare event for a cost-plus contract to be signed only to protect against the risk of price-fixing. A "lumpiness" problem becomes the cause of a market failure.

In addition, there may be other industry characteristics which inhibit the utilization of cost-plus contracts. In particular, cost-plus contracts are more difficult to use, the higher the share of fixed costs in total costs, because as that share rises, so does the effect of sales volume on average costs. 49/ A policy of limiting exceptions to the Illinois Brick rule to transactions with pure cost-plus contracts is a policy which discriminates against industries whose suppliers have high levels of fixed costs.

One way to minimize the magnitude of these problems is for the courts to

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49/ For example, let the total cost of producing Q units of a good equal f + vQ, where f represents fixed costs and v variable costs. Average cost then equals f/Q + v. As f approaches zero, average cost approaches v and likewise approaches independence from Q; it thus becomes easy to predict. On the other hand, as v approaches zero, average cost approaches f/Q and is highly dependent on Q. As average cost becomes more dependent on Q, it becomes harder to predict, and a cost-plus contract becomes a more risky proposition.

utilize a lenient interpretation of the cost-plus exemption. One does not have to share Harris and Sullivan's characterization of collusive overcharges as "almost always" passed on 50/ to believe that there must be many instances other than those satisfying a pure cost-plus standard in which either 1) transactions take place in an environment so close to cost-plus contracts that most or all of the overcharge is "obviously" passed on, or 2) it is easy to determine how much of the overcharge has been passed on, without recourse to formal estimates of market elasticities. In the first category one might want to include, inter alia, cases where "the [resale] price . . . [is] arrived at by . . . [a] rigid, formulaic calculation" 51/ or where certain kinds of government regulation determine in advance that all input costs may be passed on. 52/ In the second category one might place so-called "fixed price incentive" contracts, where any deviation of the final price from the contracted price is shared by the two parties according to an agreed-upon formula. If this reasoning is accepted, then one might argue further that the contract need not specify in advance the exact quantity to be purchased.

Some would contend that the existence of these kinds of market arrangements are evidence that the Illinois Brick decision was unwise. As we have noted elsewhere in this paper, we are not convinced that this is necessarily the case. We do believe, however, that at the least such

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50/ Harris and Sullivan article, at 274.

51/ Note, A Legal and Economic Analysis of the Cost-Plus Contract Exception in Hanover Shoe and Illinois Brick, supra fn. 9 at 757, discussing In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979).

52/ Cf. Eastern Air Lines, Inc. v. Atlantic Richfield Co., 609 F.2d 497 (Temp. Emer. Ct. App. 1979).

arrangements argue for a broad reading of the exceptions allowed in Illinois Brick--a reading which recognizes that whatever the merit of the decision for the economy as a whole, there are specific, easily identified instances where the Illinois Brick rule is inappropriate. Such a reading, by making an important property right more easily transferable, would seem likely to assist in the efficient allocation of resources in the economy.

EPO Discussion Paper Series

1. Schwartz, Marius, and Robert Reynolds. "Contestable Markets: An Uprising in the Theory of Industrial Structure: Comment." EPO 82-1, June 17, 1982.

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3. Reynolds, Robert J. and Bruce R. Snapp. "The Economic Effects of Partial Equity Interests and Joint Ventures." EPO 82-3, August 3, 1982.

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5. Pittman, Russell W. "Predatory Investment: U.S. v. IBM." EPO 82-5, October 15, 1982.

6. Downing, Paul B. and Lawrence J. White. "Innovation in Pollution Control." EPO 82-6, October 22, 1982.

7. Werden, Gregory J. "Market Delineation and the Justice Department's Merger Guidelines." EPO 82-7, December 1, 1982.

8. Schwartz, Marius, and David Eisenstadt. "Vertical Restraints." EPO 82-8, December 2, 1982.

9. Brennan, Timothy J. "Economic Efficiency and Broadcast Content Regulation." EPO 83-1, January 1, 1983.

10. Schwartz, Marius. "Entry Patterns Under Decreasing Cost Conditions." EPO 83-2, January 3, 1983.

11. Joyce, Jon M. "Why Do Firms Rely on Barter." EPO 83-3, January 6, 1983.

12. Hall, William P. "The Learning Curve, Demand Growth, and Market Concentration." EPO 83-4, February 11, 1983.

13. Kimmel, Sheldon. "Intransitive Choice and Dependence on 'Irrelevant' Alternatives." EPO 83-5, March 17, 1983.

14. Williams, Michael. "The 'Separable Cost Remaining Benefit' Overhead Cost Allocation Method: A Game Theoretic Perspective." EPO 83-6, March 21, 1983.

15. Johnson, Richard L. "Networking and Market Entry in the Airline Industry: Some Evidence on the Inefficiencies Introduced by Regulation." EPO 83-7, March 31, 1983.

The CHAIRMAN. Thank you, Senator, for your able statement.

We will now be pleased to hear from Senator Jeff Bingaman, a new Senator here, and a former attorney general of the State of New Mexico.

Senator BINGAMAN. Thank you very much, Mr. Chairman.

I want to, of course, commend Senator Gorton and Senator Rudman for their leadership in drafting this bill, and I appreciate the opportunity to be a cosponsor of it.

A great deal of work has been done in trying to carve out some limited exceptions to the *Illinois Brick* decision in previous sessions of the Congress. I feel that the narrowly drawn bill that they have come up with this time is the least the Congress should do. It addresses the most important and most obvious faults resulting from the *Illinois Brick* decision.

I have a prepared statement that I would like to offer for the record rather than go through it here before the committee, but I would like to call the committee's attention to a particular——

The CHAIRMAN. Senator, that would be fine, if you wish to put your entire statement in the record, and then we will let you highlight it.

[The following statement was received for the record:]

June 8, 1983 STATEMENT OF SENATOR JEFF BINGAMAN

Mr. Chairman, I am pleased to have this opportunity to appear in support of S. 915, the Taxpayer Antitrust Enforcement Act of 1983. It is an honor to join my distinguished colleagues, Senators Rudman and Gorton, as a cosponsor of this bill. As a newcomer to the Senate, I realize this bill is the product of some years of effort, and I want to commend them for their energy and leadership in this area.

Mr. Chairman, as Attorney General of the State of New Mexico, I advocated similar legislation, and I am as staunch in my support for this measure today. S. 915 provides responsible public officials with the means to preserve and protect the interests of taxpayers in their states from the needless waste of millions of dollars in the form of inflated prices as a result of price fixing or bid rigging in the procurement process.

The current state of the law does not permit taxpayers to recover tax dollars paid in the form of inflated prices. In 1977, the Supreme Court decided the case of Illinois Brick v. Illinois, 431 U.S. 720 (1977). The State of Illinois had sued manufacturers of concrete blocks for price fixing. The blocks had been sold to middlemen who in turn sold them to the State. Illinois sued for injury to itself and not as parens patriae on behalf of its citizens. In disallowing the suit, the Supreme Court held that suits under Section 4 of the Clayton Act could be brought only by direct purchasers and not by buyers farther down the chain of distribution who were indirect purchasers. However, approximately 90% of the purchases made by State and local governments are through middlemen. Costs which are attributable to price fixing are thereby absorbed by taxpayers because the State or local government is an indirect purchaser.

By limiting the right to sue to direct purchasers, the Illinois Brick decision denies legal rights to citizen-taxpayers who are the parties most likely to be injured. It preserves the right to sue to parties least likely to be injured or least likely to file suit in antitrust violations. Middlemen such as contractors are reluctant to pursue actions against their suppliers for fear of retaliation in future purchases. And, because the higher cost has been passed on, the middleman may have no reason to sue for he has not been financially injured. However, the fact is that the middleman still has the right to sue and if he chooses to and is successful, any recovery results in a windfall. This is simply not logical public policy.

The Right to Sue For Antitrust Violations

S. 915, Taxpayer Antitrust Enforcement Act of 1983, is a limited and responsible approach to the issue. To provide a remedy to a State or any of its political subdivisions to recoup tax dollars spent through higher prices for indirect purchases, the bill would allow the Attorney General of a State to sue on their behalf. Further, the action could be maintained regardless of whether the entity has purchased indirectly from the alleged violator.

The bill clarifies the law and grants authority to Attorneys General to represent natural persons who have been injured by price fixing or bid rigging. For example, if a merchant sells a stove and later discovers that the price was fixed by manufacturers, he or she may sue under the antitrust laws. However, if the merchant has passed the rigged price on to a consumer, there is no remedy for the consumer because he cannot sue under Illinois Brick as an indirect purchaser. Costs of litigation can be prohibitive when considered in terms of the hiked price. By eliminating this loophole in the law, consumers will be restored a legitimate right.

Safeguards to Protect Sellers From Unfair or Frivolous Claims

In restoring the right of indirect purchasers to bring suits, there has been criticism that defendants would be exposed to frivolous lawsuits. The bill would not permit an individual consumer to bring action against the seller through a private attorney. Only the respective Attorney General would be authorized to do so. Similarly, cities and counties must be represented by the Attorney General.

As an additional safeguard, the bill specifically allows a defendant to prove as a partial or complete defense to the action that some, or all of the potential damages suffered by the injured party have been passed on to others who are themselves entitled to recovery. This assures that defendants would not be exposed to multiple liability arising out of actions by both a direct purchaser and an Attorney General for an indirect purchaser. The apportionment of damages for violations would thus be according to actual loss.

Because Attorneys General of the respective States generally have limited resources available and are under the scrutiny of their state legislatures, it can reasonably be said that they would not undertake litigation without careful analysis of the chances for success.

The Act Will Not Complicate Antitrust Proceedings Or Have Much Effect On the Work Load of the Federal Courts

Antitrust cases would be no more complex than they have been before the Illinois Brick decision in 1977. Complexity is, in fact, reduced by permitting only direct purchasers or

Attorneys General or the U.S. Attorney to be parties to a case. The proposed legislation seeks to assure that the truly injured are the ones who recover.

By providing limited access to the courts only to Attorneys General or direct purchasers, the work load of the Federal courts would not be substantially increased. This limited initiation of prosecution should dispel any fear that the floodgates of private litigation would be opened wide.

S. 915 Cures the Potential Preclusion of Citizens to Recover Damages Under the Parens Patriae Provision Adopted in the Hart-Scott-Rodino Antitrust Improvements Act of 1976

In *Hanover Shoe, Inc. v. United States Shoe Machinery Corp.*, 392 U.S. 481 (1968), a direct purchaser sued a manufacturer for price fixing. The manufacturer argued in its defense that the direct purchaser had not been injured because the illegal overcharges had been passed on to customers. The Supreme Court rejected this defensive use of the "pass-on" theory. The Court held that direct purchasers could sue for antitrust damages despite the fact that the higher costs had been passed on.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 granted the State Attorneys General the authority to sue as *parens patriae* on behalf of the State's citizens for antitrust violations. Price fixing generally results in higher prices on mass-produced items which injure millions of consumers each in a relatively small amount. Without *parens patriae* actions, the chances of consumers seeking compensation for their injuries would be remote. The intent of the Act was to increase the likelihood of prosecution and thereby deter violations. However, since consumers normally purchase items indirectly through middlemen such as retailers, they may be precluded under Illinois Brick from recovering. S. 915 cures that and clearly authorizes recovery for indirect purchasers through actions brought by the State in its parens patriae capacity to represent its citizens. The proposed legislation revitalizes the 1976 Act.

Conclusion

In conclusion, Mr. Chairman, this bill provides significant benefits and adds no new prohibitions to the antitrust laws. It adjusts them in such a manner that they will be strengthened to provide enforcement. The bill will help keep prices down through its deterrent effect and in this way encourage business competition which is the basis of our free enterprise system. By protecting taxpayers' dollars, the net effect will be renewed confidence in the marketplace and government.

Precluding citizens, states and local governments from recovering for damages from price fixers results in waste of tax dollars if purchases are through middlemen. The Federal government also makes many indirect purchases. Currently, antitrust violators may enrich themselves at the expense of the public treasury with little fear of being held liable for damages. S. 915 will rectify this and conserve tax dollars which will lead to cost efficient government.

Fairness to consumers and taxpayers requires that the right to sue be returned to the truly injured party in antitrust violations. Ultimately, tax money is at issue and unless local governments can file antitrust suits against those who have gouged them through price fixing or conspiracy schemes, the public will suffer.

We devote much time and energy in this body to devise means to eliminate waste, fraud, and abuse from our programs. This is right and proper since such abuses bleed the treasury and sap the public's confidence in their government. This bill provides responsible state and federal officials with means to obtain redress from such illegal action.

I hope the Committee will act favorably on this bill. Thank you, Mr. Chairman.

Senator BINGAMAN. Thank you very much, Senator.

I would like to call to the committee's attention a particular case that came up during the 4 years I was attorney general of New Mexico, that I believe indicates the need for this bill.

The Justice Department brought a criminal prosecution against several of the companies involved in cement manufacturing and production and got criminal convictions in our district court in New Mexico. Obviously, once that case was complete, it fell upon those who had purchased that cement and ultimately used it, to determine whether or not they could obtain damages. The obvious largest purchasers were the State of New Mexico and several of its subdivisions.

As attorney general of the State, we began the process of trying to obtain recovery for the State and for the subdivisions for the overcharges that had resulted from the price fixing that had already been proven in the criminal case. We ran directly into the problems caused by the *Illinois Brick* decision.

As far as I know, that case is still pending and the reason it is still pending after these 2 or 3 years is because of the *Illinois Brick* decision and the ability of the defendants there to raise that as a defense.

Clearly, if this legislation that is being proposed today and discussed before this committee had been in effect, as an indirect purchaser, the State and its subdivisions would have been able to go ahead and recoup for the taxpayers of the State the amounts that had been illegally overcharged, I think clearly that is an example that needs to be kept in mind by this committee and by the entire Congress in dealing with this issue.

In short, I believe the legislation is well drafted. I believe that it is needed and I believe that the attorneys general of the country are certainly well-equipped to enforce it in a responsible manner. I believe that this committee should favorably report the bill and I hope the Senate will pass it.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

We are very pleased to have your statement at this time.

Is there anything else you gentlemen would like to say at this time?

Senator Specter will be here in just a moment, and I believe I will wait until he comes.

We have some questions to propound.

Senator Gorton, the Supreme Court's opinion in *Illinois Brick* emphasizes the enormous economic uncertainties and complexities of establishing indirect purchaser claims.

Aside from limiting the number of plaintiffs who may bring such suits, does S. 915 in anyway address the practical problems inherent in such suits, problems which are basically the same regardless of the identity of the plaintiff?

Senator GORTON. Obviously, Mr. Chairman, the most important change in this bill from the bill which would simply overrule *Illinois Brick* in toto is with respect to who the plaintiffs are. We do not, when we are limited 52 attorneys general, Federal and State, have anything like the huge complexity which was created by a class which could include almost an infinite number of plaintiffs, and that is the principal change, the principal gain in this respect.

Perhaps the next most important, however, Mr. Chairman, is the fact that by limiting the plaintiffs in such a case to the attorneys general, we avoid what I remember was one of the overwhelming and most deeply felt criticisms on the part of the business community of earlier bills, and that is the use of contingency fee contracts with private attorneys who, it was said, very often were bounty hunters, simply looking for cases to bring, often ones in which they could win settlements even though their claims were dubious in nature, but because we have limited this simply to States and because we have also limited it to section 1, to price fixing and to bid rigging, the administrative complexities in bringing such a case are relatively small.

Finally, the difficulties of proof of losses due to price fixing on the part of the indirect purchaser are certainly not nearly as difficult as the proof of many damages, many causes of action not related to antitrust at the present time.

We have not normally, as a matter of judicial administration, said that because there is some difficulty or complexity in proving real damages, denied a cause of action. That is something which the Court simply should be willing to solve, and can under this bill.

Senator SPECTER [presiding]. I was agreeable to substitute for the chairman of this committee at 9:45, but I had no idea that I would be facing three attorneys general from the past who are currently in the Senate.

Senator GORTON. And more behind us.

Senator SPECTER. Who are willing to come into the U.S. Senate? That might require some action on my part to organize ex-district attorneys.

The chairman has told me that he has asked the first of his prepared questions, and has asked me to proceed with the second of his prepared questions, which I shall now do.

To what extent does your bill overrule the Supreme Court in the *Hanover Shoe* case?

Is the chairman correct in his reading of the new section 4, that it would allow the defendants to assert a pass-on defense in a suit brought by plaintiff?

How often do you believe that such a pass-on defense will be asserted in private antitrust litigation if S. 915 were enacted into law?

Senator RUDMAN. Would you repeat the latter part of the question?

Senator SPECTER. How often do you believe that such a pass-on defense will be asserted in private antitrust litigation if S. 915 were enacted?

Senator GORTON. We do not believe this would affect private litigation.

However, if you ask how often in a State case is that defense going to be asserted, I cannot imagine a good lawyer not asserting it, whether he had a claim or not. I would expect it to be involved in every such case.

Senator SPECTER. To what extent does the bill overrule the *Hanover Shoe* decision?

Senator GORTON. To the extent that it overrules *Illinois Brick,* that is to say, in State brought cases.

Senator SPECTER. In your written statement, continuing with Senator Thurmond's questions, you note that under section 9, the problems of unduly complicating a case are avoided because not every indirect purchaser would be entitled to recover, nor would damages be as difficult to apportion.

By this statement, do you mean to suggest that price increases would not have to be traced through each step of the chain of distribution in order to determine the extent of injuries suffered by the State or its citizens?

Senator GORTON. I missed that.

Could you try that one again?

Senator SPECTER. Senator Thurmond cites your statement and then asks if you are saying that price increases would not have to be traced through every step of the chain of distribution in order to determine the extent of injury suffered by the State or its citizens?

Senator GORTON. Well, of course, we are dealing only with price increases that are the result of antitrust violations. Whether or not they would have to be traced precisely to each of those steps is a question that I am not certain that I can answer with total confidence. I would suspect for a normal burden of proof to be met, it probably would have to be followed through. If we can imagine a theory that is hard to relate to actual facts, that there was a 10-percent increase in the charge which the manufacturer made to a middleman as a result of the violation of the antitrust laws, but that somehow or other, through such immense competition between middlemen, that 10 percent disappears before it gets to the ultimate purchaser and the manufacturer could prove that the ultimate purchaser paid no more than he would have in an actual free market, I do not believe that the ultimate purchaser would have a cause of action I cannot conceive that that situation—of a situation in which that fact pattern would arise, but if it were proved to be the case, I do not believe any recovery could be made.

Senator SPECTER. Senator Thurmond's next question is: you also indicate that multiple liability is avoided under provisions of your bill.

How can you assure, however, that there will not be doubled recoveries and inconsistent judgments in a case where an indirect purchaser's lawsuit is litigated to judgment prior to the filing of a claim by a direct purchaser?

Would the direct purchaser be bound by the results of the earlier case?

Senator GORTON. I would presume that in almost every case, because there are so few potential plaintiffs, only one per State, that the middleman, the direct purchaser, would be on actual notice of the existence of the lawsuit long before it went to judgment, and that the defendant could almost certainly bring that purchaser into the case.

Senator SPECTER. But if he chose not to bring that direct purchaser into the case, would that direct purchaser be bound——

Senator GORTON. If the person who was the person responsible for the price fixing in the first place consciously chose not to bring potential claimants into the case, again, perhaps as a theory, that an additional liability would exist.

Again, I would suspect that liability could be passed on to that manufacturer's attorneys under its errs and omissions because that would be such a serious error on the part of those lawyers. Again, I do not believe this to be a question of practical consequence.

Senator SPECTER. That would be a somewhat different kind of joinder. Joinder is frequent where a defendant brings in additional defendants on—a defendant will bring in additional defendants on contribution or indemnity provisions under the Federal rules, but it is somewhat unusual for a defendant to bring in an additional plaintiff.

Senator GORTON. Yes, I suppose it is.

Your situation would be where the State of Pennsylvania is bringing a suit against the General Widget Manufacturing Corp., for conspiring with the Amalgamated Widget Corp., to fix prices and somewhere in between those two is a middleman or a distributor. The very beginning of that lawsuit, of course, is going to result in notice to that middleman and, of course, also to General Widget Manufacturing Corp., that there may be some claim and exactly to the extent the manufacturing corporation regards that other claimant as making the claim, it would, I think, bring it into the same litigation. You would also have a statute of limitations problem.

As a practical matter, antitrust suits do not get settled within the time of the statute of limitations. If we brought suit this year, and if it was 6 or 8 years until it was settled, it would be too late for that middleman.

I guess my summary is while there is a theoretical potential for a secondary liability, in the real world, it is never going to come into play.

Senator SPECTER. But you would suggest that a potential plaintiff, if he had actual notice, would be obligated to enter into the litigation or would be estopped from asserting a claim at a later time?

Senator GORTON. I think that would be an accurate answer, yes.

Senator SPECTER. Senator Thurmond's fifth and final question on this series is: I understand your argument as to why this bill is in the public interest.

However, I am also aware of the argument that the public interest is not served by giving direct purchasers the right to sue at the expense of greatly complicating litigation and allowing antitrust violators to elude punishment.

There is an argument that can be made the public interest is better served if antitrust violators know that retribution will be swift and sure.

How do you respond to this line of thought?

Senator GORTON. Very simply, Mr. Chairman: antitrust violators cannot under present law, given the *Illinois Brick* decision, know that retribution is going to be swift and sure.

In many, many cases that middleman between the person who is seriously damaged and the person who is engaged in an antitrust violation, is either unwilling to sue because of a close and intimate relationship with a major manufacturer or indifferent to a lawsuit because it has been quite able to pass on the entire overcharge to the indirect purchaser, and thus, in reality, as opposed to in law, is not damaged at all. It is only by passing this bill that we are going to have retribution which is swift and sure and probably control violations of antitrust laws.

Senator RUDMAN. I would only add to that, when you consider the class of plaintiffs that are created under this legislation and the very substantial interests they represent, it seems when you balance the equities with that argument, the other argument really disappears.

Senator SPECTER. I would be interested to know what problems you Senators found as State attorneys general were caused by this decision?

Senator GORTON. Well, it probably affected my deputy for antitrust who is going to speak on one of the next panels and can certainly correct me if he wishes, but I believe it impacted at least 80 percent of our antitrust cases. In very rare instances the State was a direct purchaser from the manufacturer of the goods which could be the subject of an antitrust case. Almost always, the State, like you or me as an individual, was an indirect purchaser and purchased its goods from a wholesaler or from other bidders.

So the *Illinois Brick* defense is presented routinely in almost all antitrust litigation involving States at the present time and it very frequently, in many more than half of the cases, is a seriously presented defense.

In addition, since *Illinois Brick* has been handed down by the Supreme Court, I suspect that many States, including my own, have simply backed away from what we consider to be otherwise good and valid antitrust claims because the *Illinois Brick* defense was so obvious, and under the terms of the Supreme Court decision, so meritorious.

Senator RUDMAN. That is precisely what happened in New Hampshire. Because of the scarcity of resources and, we thought, the effectiveness of the defense, the cases were just not brought.

Senator SPECTER. Senator Bingaman?

Senator BINGAMAN. I cited to the chairman earlier an example which I will repeat briefly. We did have tremendous antitrust cases where the *Illinois Brick* case was raised as a defense. One in particular that this bill would have helped us greatly on, had it been the law, was the case in which the Justice Department criminally prosecuted some cement manufacturers for price fixing and got convictions.

As soon as that case was completed, we began to assess our potential remedies on behalf of the State and the various subdivisions, since it was clear that the State and its subdivisions were the main ultimate purchasers of the cement that the price fixing had applied to. We ran squarely into the problem of the *Illinois Brick* decision. Instead of retribution being quick and just, we found that after the criminal prosecutions were complete, it was very, very difficult for us to get any damages for the State or its political subdivisions because of *Illinois Brick*. In fact, that case is still pending in New Mexico.

That was raised as a bar to the recovery because we were an indirect purchaser.

We then set about trying to put assignment clauses into future contracts which, of course, did not help us in that particular case, but that is all we saw that was left to us. We are still pursuing that case in New Mexico, but clearly the *Illinois Brick* position was a major bar to what I considered to be the rights of the people of the State, which was to be compensated for the overcharges that they have suffered in buying this cement.

Senator SPECTER. Well, thank you very much.

Anything any of you Senators would like to add?

Senator GORTON. Thank you very much, Mr. Chairman.

Senator SPECTER. Well, I will say, albeit it needless, that your testimony will be weighty indeed. Absent the elections or selections of Senator Gorton or Senator Rudman, they would have been on the Judiciary Committee, had they chosen to do so, to pass on the matters themselves.

Senator GORTON. We designate former prosecuting attorneys as our surrogate.

Senator SPECTER. We accept the designations.

I call the next panel, Hon. Allen I. Olson, Governor, State of North Dakota; Hon. David Frohnmayer, attorney general, State of Oregon; Hon. Robert T. Stephan, attorney general, State of Oregon; and Hon. Charles Oberly, attorney general, State of Delaware.

Welcome, gentlemen. I am advised that the procedure has been established to divide the time with 7 minutes available for each of you gentlemen.

Governor Olson, you are at the top of the list.

STATEMENT OF MEMBERS OF PANEL CONSISTING OF HON. ALLEN I. OLSON, GOVERNOR, STATE OF NORTH DAKOTA; HON. DAVID B. FROHNMAYER, ATTORNEY GENERAL, STATE OF OREGON; HON. ROBERT T. STEPHAN, ATTORNEY GENERAL, STATE OF KANSAS; HON. CHARLES M. OBERLY III, ATTORNEY GENERAL, STATE OF DELAWARE

Governor OLSON. Thank you, Mr. Chairman.

After listening to the colloquy between you and previous panel, I am tempted to introduce this panel as the footsteps you thought you heard belong to Attorneys General Oberly, Frohnmayer, and Stephan from Kansas.

We are here to present a current perspective, I believe, from the positions of chief executive and chief law officer of the States that we represent.

In the interest of time, Senator, I am going to set aside the prepared testimony which, to a great extent, reiterates the major points made by the panel of Senators and concentrate and focus my comments to you on the effect of the *Illinois Brick* decision, the chilling effect that it has had on the taxpayers in our States.

I come to you from a background of private and public law practice, including assistant director of the legislative staff in my State, and two terms as Attorney General, and now as Governor.

We had a very fractious legislative session just recently. In North Dakota I believe we had, on a percentage basis, the largest gap between projected revenues and authorized expenditures for its budgeting period. It is on a 2-year basis, a biennial period, and I have participated in and provided leadership in my State to cut the budget severely and to raise taxes substantially, and so I am particularly sensitive to any inhibition that is placed on the taxpayers' interest in a State like mine where we face very serious fiscal difficulties. It is simply not acceptable to me in the position I now hold, responsible for the fiscal situation and the spending of public dollars in the State of North Dakota, to continue to face this situation presented by *Illinois Brick*.

It simply does not allow us to make the most efficient expenditure of public funds that the Senators discussed in such an articulate fashion.

The ultimate cost of this particular decision rests with the taxpayers of our States.

I was surprised when the staffs of the National Governors' Association and the National Association of Attorneys General called and asked for my participation. I was surprised in the sense that something had not been done about the *Illinois Brick* decision, although I was generally although vaguely, aware that the matter still stood in the U.S. Congress. But it is very sensitive to us who hold the direct responsibilities for managing and administering public funds that taxpayers bear the significant burden in this situation.

Senator SPECTER. Is there any estimate available, to your knowledge, either for the State of North Dakota, or any other State, if you know, or the States generally, showing how much money States have been unable to recover because of this decision?

Governor OLSON. I do not know. Unless the other State representatives can help me. I can give you an eyeball figure based on my judgment, coming from the attorney general's position, and now in the Governor's office. I would say it would be in the hundreds of millions of dollars.

Senator SPECTER. Enough perhaps to close the gap between revenues and expenditures?

Governor OLSON. Well, we need more than that, of course. But we are in the proverbial hot seat. Needless to say, given my participation in cutting the budget and raising taxes, my constituents are not likely to raise a statute of me on the Capitol lawn.

We and the attorneys general share this as the most significant offices of State government, that our constituents expect their dollars to be managed as efficiently as possible, and they have a difficult time understanding the complexities of Supreme Court decisions and other excuses for, in the case of price fixing, those who fix prices being exempt from responsibility. It is difficult to explain to them and we struggle with that and I do not think it is excusable that we continue to go on in the situation we are in.

I was interested in the prepared questions dealing with complexity. I was impressed with S. 915 in its simplicity and its directness. It was somewhat unexpected. I expected another 12 or 15 pages to say the same thing. This is limited to the attorneys general or the Attorney General of the United States. It seems to me it goes right to the problem that we have been discussing for 6 years, and I believe it is something that the people of my State and other States of this Union can understand.

With that, as I have indicated, Senator Specter, the prepared testimony does reiterate the points made by the panel of Senators and I know that my former colleagues in the attorneys general office have something to say to you, and I will yield the remainder of my time to them.

Senator **Specter**. Thank you very much, Governor Olson.

There will be some questions which we may direct at you but let's proceed to the next witness.

Mr. **Frohnmayer**. I am David Frohnmayer, attorney general of the State of Oregon, and I am very pleased to have received your committee's invitation to testify.

I have a written submission which I would like to be made a part of the hearing record.

Senator **Specter**. Yes, it will be.

Mr. **Frohnmayer**. Let me put it simply, the *Illinois Brick* decision has had a devastating impact on our ability to protect the public purse and to protect consumers.

Let's consider in bold outline what the effect of the *Illinois Brick* decision is because it means that even if you have the most blatant price fixing conspiracy and you can prove it, even though you can show injury to the State and its political subdivisions in the hundreds of millions of dollars and you can prove that by economic testimony or hard testimony, or even defendant's admission, if the State happens to be an indirect rather than a direct purchaser, it cannot recover one penny under current versions of the *Illinois Brick* decision. That is compounded by the fact that in most situations in which our antitrust division is aware, the direct purchaser is unlikely to bring a lawsuit because of the various forms of economic dependence on the suppliers.

So as a consequence, costs which are passed on to State governments or to consumers by the middlemen are never the subject of antitrust recovery in the wake of this decision. That means that State governments are vulnerable 90 percent of the time. It is the estimate of our antitrust division in Oregon, and that estimate is consistent with those of our sister States around the Nation, that 90 percent of the State and local governments are indirect purchasers which means there is antitrust vulnerability that even though the violation occurs, there can be no recovery in 90 percent of the cases of the cost for public works and public procurement throughout the States of the Union.

Let me describe to you briefly, turning to the Chairman's question concerning the fiscal impact on a representative State, about the effect that the *Illinois Brick* decision has had on the State of Oregon.

Prior to the decision in *Illinois Brick,* the State, acting on behalf of its consumers, had settled or been awarded judgments in antitrust cases totaling $6.33 million. The net recovery to Oregon's public bodies and its consumers prior to April 30, 1976, was $5.78 million after recovery of costs and attorneys' fees paid to the Department of Justice, or to private counsel.

In the tetracycline antitrust litigation alone, a settlement in excess of $2.2 million was achieved and $1.2 million of that was rebated to Oregon consumers through a claims process.

The remainder paid the expenses of the Department of Justice or was distributed throughout to welfare agencies or hospitals which had purchased the drugs.

Senator **Specter**. How did you make the determination for that distribution proceeds?

Mr. **Frohnmayer**. There was an actual newspaper publication, Mr. Chairman, in newspapers of general circulation, and the individual claimants were asked to submit cost claims. It was a massive procedure but well administered.

Senator **Specter**. How many cents on the dollar did they get back?

Mr. **Frohnmayer**. I am not certain I have that on the top of my head. I will be pleased to provide it for the record.

Senator **Specter**. Could you give me an estimate?

Mr. **Frohnmayer**. No, I cannot.

[Estimates provided by the Oregon Department of Justice subsequent to this testimony indicate that recoveries were on the order of 13 to 14 cents on the dollar.]

Senator **Specter**. Was the litigation handled by the attorney general or private counsel?

Mr. **Frohnmayer**. Private counsel helped but the case was administered by the office of the attorney general.

Senator **Specter**. Do you have any question of fees in that case?

Mr. **Frohnmayer**. I am not sure I understand.

The fee question in what sense?

Senator **Specter**. The fee question for private attorneys.

Mr. **Frohnmayer**. That was not an issue so far as I remember in the litigation.

My point is that case could not have been brought after *Illinois Brick* because the vast majority of the claimants were indirect purchasers and there would have been no injured consumers within the meaning of *Illinois Brick* to recover.

In the wake of *Illinois Brick,* there have, in fact, been very few recoveries in Federal antitrust cases. There was approximately a $40,000 recovery in the *Ampicillin* case, and a very small recovery in the *Broiler* litigation. Because of innovative methods of dealing with settlement funds, we have had better luck with the *Rebar* litigation, a case brought on behalf of Oregon and Washington, in which we expect to see some distribution to indirect purchasers.

We have seen a devastating effect on the ability of the State of Oregon in conjunction with four other States in the Multidistrict Litigation, 150 consolidated proceedings against major oil companies for alleged price fixing activities.

In addition to that the very financing of the antitrust revolving account has been adversely affected because with the slowdown in recoveries, the revolving fund set up to help fund these activities on a sustained continuing basis, bearing in mind the typical antitrust case involves 5 to 6 years at a minimum, that revolving fund has been dwindling lately because of the revenue shortfall and because of that our staff in the antitrust division has dropped from four attorneys in 1980 to but one attorney at the present time.

It is important to note again for emphasis that the vast bulk of purchases of State governments are indirect. Ninety percent of Oregon's purchases of goods and services are indirect.

In the eight Federal cases pending at the time that *Illinois Brick* was decided, after surveying those, one involved cases exclusively dealing with indirect purchasers, five involved cases of both direct and indirect purchasers with the overwhelming purchases being an indirect nature.

So the point is of the eight pending cases, six of them were severely crippled, if not outright thrown out of court, in effect, by the result of the *Illinois Brick* decision being handed down.

Mr. Chairman, we have reviewed carefully the considered amendment and compromises of Senate bill 915. We believe that the parade of terribles which was urged with respect to other corrective legislation is not a justified accusation to be made in this case because it is narrowly targeted in Senate bill 915 to deal precisely with the abuses of monopolistic practices. We certainly urge this committee's favorable action.

Senator SPECTER. Thank you very much, Attorney General Frohnmayer, for your helpful statement.

I will turn now to Attorney General Robert Stephan.

Mr. STEPHAN. Thank you, Mr. Chairman.

I would like to make my prepared remarks part of the record.

Senator SPECTER. Your prepared remarks will be made a part of the record, without objection, as will all the prepared remarks.

Mr. STEPHAN. Also, with regard to the statement of Senator Gorton, just in case that is made known to Senator Kassebaum or Senator Dole, would you please advise them I have no interest at all in running for the U.S. Senate.

Senator SPECTER. Yes, I will, and they will be very glad to hear that.

Mr. STEPHAN. I was at a gathering last night and I saw a Member of the U.S. Senate and he asked me what I was doing in town, and I said that I was here to testify on *Illinois Brick.* He said, my God, I thought that was dead and buried.

I assured him that a lot of us in the association wish that it was in regard to the fact that we wish a law would be passed.

You know, sometimes I wonder if people think we are trying to snatch innocent folks off the street and put them in jail. We are talking about people who defile the justice system. We are talking about criminals.

We hear comments that we should let the economy be free and let the marketplace determine the price, and yet under the table we have price fixers that determine the price.

Senator SPECTER. Are you suggesting that the State attorneys general ought to have criminal jurisdiction as well as the U.S. Attorney General for those criminals in price fixing cases?

Mr. STEPHAN. Well, whether you call it antitrust, price fixing or criminal action, they are one and the same. I do not have much use for people that manipulate the system.

Senator SPECTER. Does Kansas have an antitrust law which would permit a criminal prosecution to be brought within the State?

Mr. STEPHAN. We do but, unfortunately, it is generally covered by misdemeanor statute.

Senator SPECTER. That might be adequate on sentencing.

Mr. STEPHAN. Everybody looks at this white collar as if no one ought to go to jail, so the best punishment is a financial punishment.

It is just inconceivable to me that you can manipulate the system so easily by having a middleman and thereby isolate yourself from an appropriate legal action.

On the plane yesterday I was sitting next to a priest and who can give you better advice than a priest. And he also asked me what I was doing in town. Everybody wants to know what I am doing. I told him, I am trying to extend the viewpoint of all the attorneys general in this country and at one point all the Governors, and that is what I told the priest. I said, well, Father, the Governors want a law passed and the attorneys general want a law passed and the only people that do not seem to want it passed unfortunately, are some Members of the Congress and some members of the business community.

And he said, well, if that many people in positions of authority in the State want it, it seems like it is a good public measure, and I would certainly cheer that on.

It is a good public measure. You know, the question has been asked, it was asked of the Senators and now of the attorneys general, and Governor Olson, about the financial impact. You know, if there were not any penalties in regard to burglary, why would you burden yourself with the prosecution of a burglar? Just for the exercise? There are many other things that I can do for exercise that are more enjoyable.

In like manner, why do I want to go after somebody in an antitrust matter when I am precluded from resolving that matter in regard to indirect purchases. It just seems if, on no other basis other than a commonsense basis, and on the basis that this is a Nation of law, that we ought to be protecting the taxpayers, the consumers ought to be protected, and if there is a legitimate cause of action, it ought to be brought.

I can understand why people do not want ambulance chasers going after cases, but as we put a great deal of faith in the U.S. Congress, the same faith ought to be put in the attorneys general, the faith that they are going to bring legitimate actions and I certainly urge favorable passage of this bill.

Senator SPECTER. Thank you.

On the question as to whether they themselves might pursue prosecutions, either criminal or civil, under State antitrust laws, are there such laws, and are they pursued?

Mr. **Stephan**. Yes, indeed, there certainly are.

And Kansas is a leader insofar as those laws are concerned. The problem that you run into is that so many of these actions, especially in this day and age, carry on national characteristics. It is very important thereby to have the input of various States and the Federal courts just have a more far-reaching effect in your State courts, and eventually you will get there.

Senator **Specter**. I am not disagreeing that is a Federal problem. It is a national issue. We have Federal antitrust laws that are certainly paramount but the question arises whether it might be addressed on a State level, whether the State of Kansas, for example, would seek to have a civil action brought against antitrust violators. The laws of Kansas do not need to coincide with the indirect purchaser limitation. I do not know offhand what long arm procedures exist in Kansas, but there are ways of obtaining jurisdiction over companies which do business in Kansas.

If the 50 States were to initiate State policies of having State attorneys general bring these actions and engage manufacturers or other potential antitrust defendants in multiple-State actions, there might be less objection to having Federal legislation which would take over this issue.

Mr. **Stephan**. As you are aware, Kansas is not the largest State in the Union, probably one of the best, but not the largest.

Senator **Specter**. I think Kansas is one of the best. I was born there.

Mr. **Stephan**. We know all about you.

The Bureau of Investigation is within the Attorney General's Office, and you are in very good standing in Kansas if you ever want to come home.

Senator **Specter**. I am not sure whether that last testimony is going to help you or hurt you.

Mr. **Stephan**. At any rate, certainly on the State level, we can take care of the ABC rental company with our resources, but they are limited and with Federal antitrust action and the involvement of the various States and indeed Federal authorities, the resources are so much more vast that it is there that you can get into and investigate these very large corporate entities.

Mr. **Frohnmayer**. May I suggest an answer to that question also?

It is possible for a State to deal on a limited basis with some of the purchasers it deals with through an assignment clause and contracts, but that only deals with a small fraction of the abuses.

Second, let me respectfully echo Senator Gorton's comment what happens in a State where an attorney general introduces legislation to change the State's Sherman Act to go after direct purchasers.

My office was flooded with visits from all sorts of people suggesting to me that the bills I submitted in 1981 were inappropriate and wrong because they were dealing basically with a national problem and by fragmenting it at the State level and having inconsistent State rules, it would be hopelessly confusing to market.

Senator **Specter**. Did you ask them if they would withdraw their objections to the Federal law?

Mr. FROHNMAYER. That quid pro quo did not seem to be forthcoming. They did recognize it as a Federal problem and suggested it was inappropriate for us to develop a State parochial solution to the problem.

Senator SPECTER. I can see the concern and I am not suggesting that really ought to be done, but it did cross my mind because you are not without power. As the chief law enforcement officers in your States, you have great power to act if you pursue that line.

But I do think it ought to be resolved in the Congress. I agree with the approach that is taken here.

The final witness today is Attorney General Oberly from the State of Delaware.

Mr. OBERLY. As probably one of the newest members, an upset winner in November, I should give you a bit of my background. I have been the chief prosecutor of the State of Delaware for many years. We have complete criminal jurisdiction and when I became a member of the association, one of the first things I heard about was *Illinois Brick,* and it struck a responsive chord because I am a descendant of Oberly Brick, which was the largest brick manufacturer in the State of Delaware for many, many years.

I am sorry to say that Oberly Brick has been put in a bad name by *Illinois Brick*.

As a prosecutor who has stood before the sentencing court on many, many occasions, as I am sure you have, it is somewhat anomalous to me that here in 1983 I have the opportunity to appear before this committee when I can go back to my office tomorrow and stand before a sentencing judge and take several poor defendants who may have stolen or ripped off the public or other private citizens and argue that they should make retribution because what they have done is bad, and perhaps they will get a jail sentence, perhaps not, but the one thing we want to do, and one thing we are trying to do, is make the victim whole.

And I have seen judges time and again order defendants to make restitution, defendants who cannot make restitution, who probably will never be able to make restitution. But we go through a great deal of effort to assure the public that the criminal justice system is responsive to them, and we will do everything we can.

Yet, the effect of *Illinois Brick* decision appears to me to say that those who can afford to pay, those who do engage in price fixing and bid rigging and whatever we may want to call it euphemistically, it is theft of the taxpayers' money.

Illinois Brick says no restitution to the public and they have got the assets. It seems to me that we can look at this almost at the most fundamental level. Is that result fair to the citizens of this country and I think that brings me to the question, or at least to the point I looked at, well, what is this *Illinois Brick* decision all about.

I went back to my staff of one who is working in this area. I got the opinion and read the testimony and I have been to a meeting of the National Association of Attorneys General, and I found that every single one of the attorneys general in the United States, be they Democrat, Republican, liberal, conservative, no matter where they come from, everyone agrees that the *Illinois Brick* decision is unfair.

I have also been told that the vast majority, if not all, the Governors in the country agree that the *Illinois Brick* decision is unfair and as several of the members here indicated, none of us have a vested interest. In fact, the easiest thing to do would be to say we cannot do anything about it, the U.S. Supreme Court has taken away our ability to bring an action and wash our hands of it and say, sorry, there is nothing we can do.

With this many people from that many disparate backgrounds all agreeing on one subject, I think anyone considering this legislation has to sit back and say, can they all be wrong?

I cannot even get my three children to agree where to sit at the dinner table, yet all of the attorneys general agree that this legislation is desperately needed, and I have to defer to their judgment because many of them have much more experience than I do.

The legislation as presently proposed is broken out into two distinct areas and it has taken into account some of the problems that were raised long before I became a member of the association but the first and foremost, as I sit here, is the right of the attorney general to bring an action where the citizens of the State have been injured through the government functions of purchasing and what we have done, while we have done no study in Delaware to say 80 or 90 percent of our goods are purchased indirectly—it appears that percentage is correct. The vast majority of goods are purchased indirectly, whether we are building hospitals or other things for the State, and in that capacity it is hard to tell the public that we cannot do anything about it.

We have an antitrust statute in Delaware. It is only civil in nature. It has no criminal penalty. The Federal Government cannot restore the civil penalties and I do not think the local judges—if the Federal judges, with the expertise and the facilities they have, believe it is difficult to measure the damages, I think it is an insurmountable burden to put on State courts, to tell them to determine what the amount of damages are.

But it should at least be in that capacity allowed for an attorney general, where the State's government function has been involved.

Second the issue is whether the attorneys general should have the right to bring the action in a parens patriae for other citizens. There are two distinct items. I firmly believe they should be given that power also, but I realize that there may be people on the committee with different views on that.

But they are separate and they are both necessary, but it should not be forgotten they can be broken out.

Senator SPECTER. Why should other indirect purchasers be barred from bringing actions?

S. 915 grants the power of standing for indirect purchasers only and for U.S. attorneys general, States' attorneys general, for State losses or in the capacity you note of parens patriae. Why should not other indirect purchasers have standing?

Mr. OBERLY. I am perhaps not the best one to answer this because I think it is in response to other proposals, but by allowing other indirect purchasers to bring them, you have the possibility of frivolous lawsuits being brought, such as class actions that are brought on behalf of derivative stockholders. There are certain entities that are continually bringing suit.

Senator SPECTER. How frequently do they lose?

Mr. OBERLY. It is hard to say. Many are brought simply to settle, so there is a question of who wins and who loses. Some of them, they know that a certain percentage is going to be arrived at. It may be 2 cents on a share. They may ask for 10. I do not know if you can really bring it out that clearly to determine who wins and loses, but by limiting the right to bring suit to the attorneys general, I think everyone's concern should be allayed in that they are not going to be bringing frivolous lawsuits.

As the attorney general of Oregon stated, their staff was four and now it is one. Our division has one attorney. We cannot afford to waste our time by bringing frivolous actions or actions except the ones that are clearly the strongest.

I think the interest invested in the attorneys general should be a cause of satisfaction in that you are not going to have these frivolous suits. You will not have attorneys general wasting taxpayers' moneys.

My time has run but in closing, Delaware did successfully participate in a master key litigation that was settled in 1976, that was just before the *Illinois Brick* decision came down. That involved both direct and indirect purchasers of hardware and master key lock systems. I think the overall settlement in litigation was about $14 million. In the State of Delaware we benefitted about $80,000 which was distributed to the State's School Districts and hospitals that had purchased these key systems.

If the *Illinois Brick* decision had been in place, that settlement would never have occurred and the State of Delaware would never have recouped any of that money.

But in closing, Senator, fairness dictates that the citizens have at least some outlet and that the law should not be a carte blanche to proceed in the way of price fixing.

Senator SPECTER. Gentlemen, thank you very much.

This is a very expansive subject. There have been a number of questions prepared but in light of the time and that we have six additional witnesses, if it is acceptable from your point of view, I would prefer to have the staff evaluate the questions prepared in light of the testimony already presented and whatever further information we feel we need to submit to you in written questions.

Governor Olson. We understand the time constraints and appreciate the time constraints you are operating under.

[Prepared statements follow:]

TESTIMONY OF

GOVERNOR ALLEN I. OLSON

on behalf of

THE

NATIONAL GOVERNORS' ASSOCIATION

ILLINOIS BRICK TESTIMONY

Good Morning.

Mr. Chairman, distinguished members of the Judiciary Committee.

I am pleased to have this opportunity to appear before you today to voice my support for S. 915, "The Taxpayer Antitrust Enforcement Act of 1983," which would in part overturn the Supreme Court ruling in Illinois Brick Company v. the State of Illinois. My name is Allen I. Olson, and I am Governor of the State of North Dakota. I appear before you today representing my fellow Governors, to reaffirm our support for legislation that would undo much of the Supreme Court's holding in Illinois Brick.

The National Governors' Association first unanimously voiced its support for legislation to overturn the disastrous effects of Illinois Brick in August 1978 at their annual meeting. NGA is a diverse group of individuals whose views traverse the entire political spectrum. However, one thing we all share in common is the need to provide governmental services in the most effective and cost-efficient manner. When we see the cost of our highways, our buildings, and our other necessary services inflated by unlawful price-fixing, we are outraged and frustrated that six years after Illinois Brick we still lack a remedy that would allow us to recover damages simply because we dealt indirectly with the manufacturers. It was this outrage and frustration which led NGA to reaffirm its policy to overturn Illinois Brick.

Mr. Chairman, we have been discussing the merits of Illinois Brick legislation now for six years through three different sessions of Congress and we are beginning again in the 98th Congress. During the 95th Congress, this Committee heard testimony from 55 witnesses during 8 days of hearings (S.Rept. 95-934). On the House side, another 4 days of hearing were held and a bi-partisan report recommended remedial legislation (H.R.Rept. 95-1397).

During the 96th Congress, my colleague, Governor Bruce Babbitt of Arizona, appeared before you to urge passage of remedial legislation, and subsequently, Governor Scott Matheson of Utah gave his support for legislation to undo Illinois Brick. Yet we are still without a legislative remedy for price-fixing manufacturers who fix prices at the taxpayer's expense. This is especially difficult to endure in these times of declining state revenues.

The Supreme Court in Illinois Brick held that state and local governments may recover for injuries sustained as a result of antitrust violations only if they purchase directly from the manufacturer rather than from a wholesaler. In reaching this decision, the Court flaunted the will of Congress as expressed in 1890 through the Sherman Act. The 51st Congress which in 1890 provided for the treble damage remedy under the Sherman Act clearly contemplated recovery by indirect purchasers. The remarks of Senator George are typical:

> "An advance in the price to the middleman is not mentioned in the bill for the obvious reason that no such advance would damnify them; it would rather be of benefit, as it would increase the value of goods he has on hand. He buys to sell again. He buys only for profits on a subsequent sale. So whatever he pays he recieves when he sells, together with the profit on his investment; and so on all of them; including the last, who sells directly to the consumer. The consumer, therefore, paying all its increased price advanced by the middlemen and profits on the same, is the party necessarily damnified or injured." (21 Cong.Rec. 1767, 1890).

States rarely purchase directly from the manufacturer-producer. Approximately 90 percent of all state purchases are made through middlemen. And these middlemen are unlikely to sue manufacturers who fix prices, for fear of losing their supplies. The middleman finds it is simply easier to pass on the costs attributable to the price-fixing. Thus, the taxpayers absorb the cost. It is imperative that the states be provided with an enforcement tool to stop the waste of tax dollars and the pilferage of state treasuries at a time when government is under pressure to rein in excessive expenditures, to be accountable, and to achieve the maximum benefit from each dollar spent. It defies reasoned explanation to allow Illinois Brick to remain the operative rule.

Generally, two types of arguments have been offered to counter this bill: First, it is claimed by opponents that allowing indirect purchasers to sue would open the floodgates of lengthy, complicated litigation. S. 915 prevents this from occurring by limiting suits to the United States Attorney General and to the state Attorneys General suing on behalf of their states. This limitation sharply reduces the number of potential lawsuits while allowing victims of illegal price-fixing to recover damages.

A second argument raised by opponents concerns the difficulty of determining damages, and the possibility of duplicative liability. First, it is usually not appreciably more difficult to measure damages to an indirect purchaser than it is to measure damages to a direct purchaser.* Clearly, it will vary from case to case as to how complicated it is to measure damages. However, the answer is not to let the price-fixers and bid-riggers walk away with their illegal profits. Secondly, S. 915 eliminates the possibility of multiple recovery by allowing a defendant to plead as a defense that a plaintiff has passed on the overcharge. It should be further noted that neither the Court in its Illinois Brick opinion or opponents of Illinois Brick override legislation have cited a single case in which an antitrust defendant was forced to pay duplicative damages.

Since Illinois Brick was decided, states have been forced to forego suits to collect overcharge damages caused by price-fixing of numerous commodities purchased by the state through middlemen. Moreover, they have had to take reduced settlements in many cases because of the large number of indirect purchases the state made in addition to its direct purchases.

The antitrust laws of this country are based on a fundamental national policy in favor of free and open competition unfettered by collusion and monopoly. This bill will help create a healthy business climate and protect the honest businessperson.

Now, Mr Chairman, when we review S. 915 we see a very limited but responsible approach to the problem. The bill deals only with price-fixing; it limits the numbers of potential plaintiffs to the Attorneys General and the Attorney General of the United States; and it prohibits multiple recovery. Most important, it will enable states to recover millions of taxpayer dollars spent in the form of inflated prices for goods purchased by state governments.

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*See for example, testimony of Peter Max, "Effective Enforcement of the Antitrust Laws": Hearings on H.R. 8359 before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 95th Congress, 1st session 204 (1980).

This bill provides states with the necessary tools to deal with antitrust violators. Clearly, we seek compromise in order to overturn the effects of Illinois Brick. We have come a long way from previous Illinois Brick bills which would allow consumers, among others, to sue, even though this may be a desired goal.

The National Governors' Association strongly support S. 915 and urges Congress to take action on the proposed legislation immediately.

In Illinois Brick the Supreme Court issued an invitation to the Congress to overrule its decision. The time is ripe to accept that invitation and overturn Illinois Brick, by enacting S. 915.

Thank you Mr. Chairman, and I will be happy to respond to your questions.

TESTIMONY OF DAVID B. FROHNMAYER
ON BEHALF OF THE STATE OF OREGON
AND THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
IN SUPPORT OF S. 915

My name is David B. Frohnmayer and I am the duly elected Attorney General of the State of Oregon.

I appear before you today on behalf of the State of Oregon with regard to legislation which my office believes is essential if Oregon, its subordinate governmental bodies and its consumers are to be protected from those who would engage in violations of the federal antitrust laws.

In particular, I speak here on behalf of the passage of S. 915, "The Taxpayer Antitrust Enforcement Act of 1983," which would in part overturn the decision of the Supreme Court in Illinois Brick v. Illinois, 431 US 720 (1977).

S. 915, as introduced, deals only with price fixing and bid rigging, and only with violations of Section 1 of the Sherman Act. It does not deal with violations constituting monopolization, such as are prohibited by Section 2. The bill, in addition, would limit the number of potential plaintiffs to the State Attorneys General and to the Attorney General of the United States, and would guarantee that the potential defendants would not be subjected to multiple liability. It would allow the defendant to plead as a partial or total defense that the plaintiff has passed on to others, who are themselves entitled to recover, some or all of plaintiffs' damages. In addition, it would very much clarify the authority of the Attorneys General to bring parens patriae suits on behalf of the natural persons who have been injured in their property by violations involving price-fixing or bid rigging.

The State of Oregon strongly recommends that this legislation be enacted. To that end, I have personally written letters to members of our congressional delegation, and members of my staff have written to various members of Congress.

Let me describe to you briefly the fiscal impact that the Illinois Brick decision has had upon the State of Oregon. Prior to the decision in Illinois Brick, the state, acting on behalf of its consumers, had settled or been awarded judgments in antitrust cases totalling $6.33 million. The net recovery to Oregon's public bodies and its consumers prior to April 30, 1976 was $5.78 million, after recovery of costs and attorneys fees paid to the Department of Justice or to private counsel. In the Tetracycline Antitrust Litigation alone, a settlement in excess of $2.2 million was achieved, and $1.2 million of that was rebated to Oregon consumers through a claims process. The remainder paid the expenses of the Department of Justice or was distributed to welfare agencies or hospitals which had purchased the antibiotic drugs. I cannot emphasize strongly enough that the vast majority of purchases involved were indirect in nature. If the Tetracycline case had been brought after the decision of the Supreme Court of the United States in Illinois Brick, recoveries would have been vastly lower, and there would have been virtually no recovery for injured consumers.

In contrast to the pre-Illinois Brick era, there have been very few recoveries by our office in antitrust actions subsequent to the Illinois Brick decision. There was approximately a $40,000 recovery in Ampicillin, and a very small recovery in the Broiler litigation. Because of innovative methods of dealing with settlement funds, we have had better luck with the Rebar litigation, a case brought on behalf of Oregon and Washington, in which we expect to see some distribution to indirect purchasers.

In addition, numerous claims brought on behalf of Oregon's consumers and other indirect purchasers have been dismissed. Perhaps the most telling example is in the case of In Re Coordinated Pretrial Proceedings in the Petroleum Products Antitrust cases, which has been transferred by the Judicial Panel on Multidistrict Litigation to the Central District of

California. In that case, Judge Gray of the Central District ruled that the five states suing a number of very large oil companies could not recover on behalf of a class of consumers which the state alleges were injured by price-fixing at the retail gasoline pump.

In addition to Illinois Brick's effect upon the right of injured consumers and businesses to obtain recoveries, the Illinois Brick decision has had other effects on the Oregon Department of Justice itself. Oregon's federal antitrust enforcement program is funded in great part through an antitrust revolving account, created by ORS 180.095. With the decline in recoveries, and with cases hindered to the point of dismissal by the Illinois Brick decision, revenues to that account have dwindled greatly. In fact, because of this shortfall in revenue to the antitrust revolving account, and because of other legislative priorities, the antitrust staff of the Department of Justice in Oregon has been dropped from a total of four attorneys to but one.

In June of 1977, when the Supreme Court rendered the opinion in Illinois Brick Company v. Illinois, it held that only those who purchased directly from an antitrust conspirator, rather than from others in the chain of distribution (e.g., from a manufacturer, rather than from wholesalers, distributors, contractors, etc.) are entitled to prove and recover damages under the antitrust laws.

It is important to note that the state and its political subdivisions only very rarely purchase goods and services directly from conspirators. Our antitrust staff estimates that 90 percent of all of Oregon's purchases of goods and services are purchased indirectly. Accordingly, the Illinois Brick decision has had a profound impact upon the section's federal cases which were pending at the time of the decision. Of those eight cases which were pending at the time of the decision, one involved claims based exclusively upon indirect purchases, and five involved claims based upon both direct and indirect purchases, with the overwhelming majority of purchases being of an indirect nature.

The impact of Illinois Brick upon the section's federal program has had both short-term and will have long-term consequences. The short-term consequences resulted from the decision's impact upon cases pending at the time the decision was rendered. These consequences are three-fold. First, the section's recovery of damages has been seriously jeopardized. The self-sustaining nature of the federal program has continued, but at a very much reduced rate. Second, the frequency with which recoveries are made has experienced a drop as a result of the additional time and effort needed to contend with the impact of Illinois Brick. Third, the section's ratio of expenditures to recovery of damages has dropped. That drop has become painfully apparent during the last two years.

In terms of long-term consequences, the decision's impact upon the number of cases which are available for prosecution is among the greatest. There is no question but that the number of cases available for prosecution has dropped precipitously in the wake of Illinois Brick.

S. 915, if enacted into law, would cure many of the ills created by the Court's unfortunate decision in Illinois Brick. It would permit the Attorney General of any state to sue on behalf of the state or any political subdivision thereof in any district court of the United States having jurisdiction over the defendant for the purpose of securing monetary relief, thereby clarifying Congress' 1976 Act granting the state Attorneys General parens patriae authority. In addition, it would provide that damages may be recovered regardless of whether or not the party represented was a direct or an indirect purchaser.

Finally, the legislation is designed to avoid the problems of "defensive pass-on" or "offensive pass-on" with which the

Supreme Court wrestled in the Illinois Brick decision. Section 2 of S. 915 would provide that the defendant in an action brought pursuant to the antitrust laws shall be entitled to prove as a partial or complete defense to a damage action, in order to avoid duplicative liability, that some or all of what otherwise would constitute plaintiff's damages has been passed on to others who are themselves entitled to maintain an action.

It is my belief that this language will protect any potential antitrust defendants from the perceived spectre of duplicative recovery by plaintiffs. The defendants, under the terms of Section 2 of the Act, would have a full and fair opportunity to defend themselves, as appropriate, in the original spirit of the Sherman Act.

This amendment does not add any prohibitions to the law; it merely readjusts the antitrust laws, which are the heart and foundation of our free enterprise system. Without this amendment, state and local governments are unable to recover millions of taxpayers' dollars lost through blatant antitrust violations. Strong antitrust enforcement will help keep prices down and help protect taxpayers' dollars at a time when all government budgets are severely stretched. I urge you on behalf of the State of Oregon and on behalf of the National Association of Attorneys General to approve S. 915.

DBF:RLC:am

DAVE FROHNMAYER
ATTORNEY GENERAL
STATE OF OREGON

DEPARTMENT OF JUSTICE
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400

October 25, 1983

The Honorable Strom Thurmond
United States Senator
218 Russell Building
Washington, D.C. 45972

Re: S. 915

Dear Senator Thurmond:

Enclosed pursuant to your request are my responses to the questions you posed with regard to S. 915.

I do hope that these responses to your questions will aid you in your consideration of the merits of S. 915. I urge you to use your good offices to prevail upon the committee to act favorably with regard to S. 915.

Very truly yours,

David B. Frohnmayer
Attorney General of Oregon

RESPONSES OF DAVID B. FROHNMAYER, ATTORNEY GENERAL, STATE OF OREGON

FIRST QUESTION PRESENTED

Would Section 4(I) of S. 915 allow defendants in all Clayton Act Section 4 actions to assert as an affirmative defense the pass-on occurred to states and/or consumers? If so, would it be possible for a defendant to obtain the joinder of all 50 attorneys general and the U.S. Attorney General as indispensable parties?

ANSWER TO FIRST QUESTION PRESENTED

S. 915 provides that the defense of pass-on should be set forth as an affirmative defense in any responsive pleading filed by the defendant. Such defendant must set forth in the pleading with as much particularity as is reasonable the identity of those to whom the defendant asserts that plaintiff has passed on some or all of plaintiff's damages.

On its face, it would appear that a defendant could attempt joinder of any state having a secondary or ultimate consumer to whom costs could be alleged to have been passed on. However, it is important to remember that an allegation is only that--an allegation. In an appropriate case, a state attorney general or the Attorney General of the United States could probably quickly extricate his or her office and state, or the United States, from such an action.

In addition, many non-class action antitrust cases are brought between single parties on either side of the litigation in closely-defined geographical areas. Accordingly, it would be unlikely in such cases that the attorneys general of all 50 states and the U.S. Attorney General could be joined as indispensable parties.

Further, Fed. R. Civ. P. 19(d) provides that the joinder provisions of Rule 19 are subject to the class action provisions of Rule 23. It is in such cases, in my opinion, that joinder of a large number of attorneys general is likely to become an issue. Since such joinder would be subject to the provisions of Rule 23, any attorney general, either of a state or of the United States, could avail himself of the benefits of Rule 23(a), for the purpose of defeating his or her active participation. In addition, pursuant to Rule 23, the attorney general of any state may have "opt-out" rights.

In addition, under Fed. R. Civ. P. 19(a), if a state attorney general should join as a plaintiff but refuses to do so, the attorney general could be made a defendant or an involuntary plaintiff. In addition, if the joined party objects to venue and the attorney general's joinder would render venue improper, the state attorney general should in fact be dismissed from the action in accordance with the terms of the rule.

The terms of S. 915 and Fed. R. Civ. P. 19(b) appear to be somewhat in conflict. In my opinion, any attorney general could made a relatively good case that because of that conflict, no defendant should be permitted to require the joinder of all 50 state attorneys general or the Attorney General of the United States. It is my view that, faced with the issue, the courts would employ a more conservative approach, and would in fact permit the lower courts to determine, pursuant to Rule 19(b), whenever joinder is in fact feasible.

SECOND QUESTION PRESENTED

Do you believe such an arguably broad repeal of the Hanover Shoe opinion will have an effect on the incentive of direct purchasers to sue for antitrust violations? Would direct purchasers be deterred from suing because of the complexity and delay resulting from one or more state attorneys general being joined to represent indirect purchasers?

ANSWER TO SECOND QUESTION PRESENTED

There can be no question but that a repeal of the Hanover Shoe decision will have some effect on the incentive of direct purchasers who have "passed on" their damage to sue for antitrust violations. However, as has been pointed out by numerous state attorneys general in the wake of the Illinois Brick decision, the true incentive to sue does not lie in the bailiwick of the direct purchaser from the price-fixing defendant, but rather such incentive and right to relief should, and does, lie in the indirect purchaser, who is generally the victim of pass-on.

In any event, the disincentive to the direct purchaser is certainly no greater than that which is posed by Illinois Brick with regard to the indirect purchasers, the parties actually damaged. As I have stated in the past, it simply does not make sense for a direct purchaser from his sole supplier to engage in internecine warfare with that sole supplier, when the direct purchaser has in fact passed on the damages to the consumer.

There can be no question but that antitrust cases can become complex and protracted. However, since the Sherman Act was passed in the late 1800's, many cases have been brought which the plaintiffs, defendants and the courts have successfully dealt with the complex nature of the litigation. It is my firm view that, regardless of the complexity involved, those who have engaged in conspiracies to fix prices or otherwise restrain trade should be held responsible to those who are ultimately injured by such activities.

THIRD QUESTION PRESENTED

While S. 915 limits indirect purchaser recoveries to states and the federal government, would the effect of price fixing, for example, still have to be traced through each distribution level in order to determine the extent of injuries suffered by the federal government, states, or their citizens?

ANSWER TO THIRD QUESTION PRESENTED

The burden of proving pass-on of damages to the consumer of any state, or to the state itself, lies upon the attorney general of any of those states which choose to bring suits alleging violations of the antitrust law and injury to their citizens or to their states. Any attorney general bringing such an action would certainly have to stand ready to trace through each distribution level the nature of damages suffered by the state or by its citizens. Particularly in cases brought on behalf of the state, or its political subdivisions, such pass-on issues may not be particularly difficult, as large contractors who work for large political subdivisions or the state itself may often be direct purchasers or may be only one-step indirect purchasers.

FOURTH QUESTION PRESENTED

If proposed Section 4(I) raises the possibility that a state attorney general will frequently be pulled into private antitrust litigation by virtue of the defendant's assertion of a pass-on defense, do offices of the various state attorneys general have sufficient resources to participate in such litigation?

ANSWER TO FOURTH QUESTION PRESENTED

It is rare indeed that the office of any given state's attorney general would have sufficient resources within their antitrust divisions or sections alone to bring major federal litigation such as the Petroleum Products Antitrust Litigation (MDL-150) or the Cement and Concrete Antitrust Litigation (MDL-296). In such situtations, state attorneys general and their staffs often enter into "cost-sharing agreements," in which the various states pledge resources, both in terms of attorneys, paralegals and investigators as well as cash to fund the litigation. To the extent that attorneys general of various states are joined as indispensable parties in cases in which they have an interest, it can be expected that the state attorneys general will continue to work together, as they have in the past, using shared resources to represent their state's public entities and citizens.

In any event, it is my opinion that an attorney general could avoid active participation in some cases, upon a good-faith determination that active participation in those cases is not in the state's best interests. In such cases, liaison counsel and others involved may well be willing to represent the interests of the state or its political subdivisions or citizens on a contingent-fee or other basis. To the extent necessary, such services could be employed.

FIFTH QUESTION PRESENTED

What is the practical effect of a state attorney general being deemed an "indispensable party" under Rule 19 of the Federal Rules of Civil Procedure? Must the case be dismissed if the state attorney general cannot be joined?

ANSWER TO FIFTH QUESTION PRESENTED

As earlier stated, there is some inherent conflict between Rule 19 and S. 915.

On the face of S. 915, it would appear that the attorney general is to be deemed an indispensable party.

However, Fed. R. Civ. P. 19(b) simply provides that an action should be dismissed if the court regards the absent person as being "indispensable." In making that decision, the court is to determined "whether in equity and good conscience the action should proceed among the parties before it* * *." In making that decision, the court is to consider (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

It would be the position of this office that S. 915 and Fed. R. Civ. P. 19 would necessarily have to be read together so as to avoid dismissal of actions where a state attorney general, for reasons of venue or otherwise, cannot be joined. It is our belief that the court should still have authority under Fed. R. Civ. P. 19(b) to determine whether the case should proceed in the absence of any particular attorney general.

Further, Rule 19(d) specifically provides that the joinder provisions of Rule 19 are subject to the provisions of Fed. R. Civ. P. 23, dealing with class action litigation. Once the court enters into consideration of Rule 23 class action propriety, an entirely different set of rules apply with regard to joinder, and the attorney general may avail himself of Fed. R. Civ. P. 23(a), to avoid the claim, or may properly opt out of the litigation.

SIXTH QUESTION PRESENTED

Section 4(I) of S. 915 would allow a defendant to utilize a pass-on defense "in order to avoid duplicative liability* * *." Does this mean that there must have been a previous finding of liability with regard to that particular defendant?

ANSWER TO SIXTH QUESTION PRESENTED

No. S. 915, and the provisions therein which would essentially overrule the Hanover Shoe opinion of the Supreme Court of the United States, is geared to solving the problem which the Illinios Brick court saw as having arisen in the wake of Hanover Shoe; i.e., that a given antitrust defendant could find itself being sued by purchasers at various levels of a distribution chain in various courts, thereby creating the danger of duplicative liability. S. 915 attempts to solve this problem by essentially requiring that all potential claimants in the chain of distribution be present in the same district court (or in the same multi-district litigation proceeding). In such situations, it is my opinion, and the unexpressed opinion of those sponsoring S. 915, that problems of duplicative liability can be avoided.

A previous finding of liability is neither contemplated by S. 915 nor necessary to its application. The purpose of S. 915 is to require that all parties having an interest or potential interest be before the court so the court may properly apportion the appropriate treble damages among the various plaintiffs in the chain of distribution.

SEVENTH QUESTION PRESENTED

Under S. 915, if the state attorney general were to bring a parens patriae suit which was litigated to judgment before a suit was brought by a direct purchaser, would the first purchaser be bound by the results in the prior suit? Does the language of section 4(I) assure that there will not be multiple recoveries and inconsistent judgments in such situations?

ANSWER TO SEVENTH QUESTION PRESENTED

It is my understanding that the median time from filing to ultimate conclusion of a federal antitrust case is approximately 4.4 years. Because the statute of limitations for antitrust claims for relief is just 4 years, and because there is no provision tolling the statute of limitations when a state attorney general brings an action, it seems unlikely that a parens patriae case would be litigated to judgment before suit is brought by a direct purchaser. To the extent that multiple parties make claims for relief based upon the same antitrust conspiracy, such cases should be properly transferred by the Judicial Panel on Multidistrict Litigation to a single forum for suit. In such a situation, all parties plaintiff will receive their appropriate portion of damages, and all parties defendant will be assured that they will not be the victims of duplicative recovery.

EIGHTH QUESTION PRESENTED

The Supreme Court in Illinois Brick discussed at great length the complexities of proving indirect purchaser claims. Aside from limiting the number of plaintiffs who may bring indirect purchaser suits, how does S. 915 address the procedural and practical problems inherent in such suits as identified by the court?

ANSWER TO EIGHTH QUESTION PRESENTED

As I have noted earlier, S. 915 is not a panacea for those who would avoid the procedural and practical problems inherent in federal antitrust litigation. Those attorneys general who file such litigation should expect to be prepared to have their staffs trace damages through the various levels of distribution. With regard to procedural problems, such problems are only as great as the parties and the court choose to make them; I have seen many cases in which a strong federal judge can move a case through to completion in a relatively short time, as well as cases where judges who are not as strong may find the cases moving much more slowly and in a much more cumbersome fashion.

NINTH QUESTION PRESENTED

Has your state recently updated its own antitrust laws? More specifically, has your state enacted any changes in its antitrust laws to address the problems you feel have been created for the states by the Illinois Brick decision? How many suits has the attorney general's office brought in recent years under state antitrust law?

ANSWER TO NINTH QUESTION PRESENTED

In 1975, the Oregon Legislature authorized the attorney general to bring parens patriae claims on behalf of Oregon's natural citizens. ORS 646.775. However, no legislation has been enacted by the state legislature for the purpose of curing Illinois Brick problems. The Oregon Supreme Court has not yet been faced with the question as to whether it should adopt the rationale of the Illinois Brick court with regard to cases brought pursuant to state antitrust laws.

TENTH QUESTION PRESENTED

It is my understanding that states can include in their contracts with suppliers and contractors assignment clauses which would assign to the states any right of recovery which the seller might have as the result of an antitrust violation. Does your state require that such assignment clauses be included in contracts? To what extent to such clauses resolve the problem which states face in bringing proprietary suits in direct purchasers?

ANSWER TO TENTH QUESTION PRESENTED

Proposed state legislation requiring the use of an assignment clause in public purchasing contracts was tabled in committee during the 1981 regular legislative session in Oregon. Nevertheless, we are aware that some state agencies do use contract forms which require assignments of antitrust claims to the agencies from the direct sellers. Such direct sellers may or may not be first purchasers. To the extent that the sellers are not first purchasers from a co-conspirator, the assignment clauses are of dubious value.

The extent to which such clauses resolve the state's problems in bringing proprietary suits as indirect purchasers is at this point untested in the courts. However, I am concerned that on many occasions those who sell to the state are not in fact direct purchasers, and therefore the assignment clauses are of little value.

ELEVENTH QUESTION PRESENTED

Attorney General Stephan indicated in his written testimony that assignment clauses are only useful if the state buys from the first purchaser. What approximate percentage of the time does your state buy from those farther down the chain of distribution than the first purchaser?

ANSWER TO ELEVENTH QUESTION PRESENTED

Discussion of one of my staff members with Mr. Frank Bale, Deputy Director of the Purchasing Division of the Department of General Services of the State of Oregon, indicates it is virtually impossible, without doing a very thorough search not only of the files of General Services, but of all state agencies, to determine the exact percentage of direct versus indirect purchases. However, Mr. Bale indicated to my assistant that the amount of indirect purchases would be in excess of 67 percent. I strongly suspect that the percentage of indirect purchasers is much higher than that two-thirds.

TWELFTH QUESTION PRESENTED

The proposed new Section 4C(a)(2) added to the Clayton Act by S. 915 directly authorizes the attorney general of each state to bring proprietary actions on behalf of the state and its political subdivisions. Has your state authorized the attorney general to bring such suits? If not, is it possible that this authorization in new Section 4C(a)(2) could conflict with existing state law?

ANSWER TO TWELFTH QUESTION PRESENTED

Pursuant to ORS 646.760 and 646.780, the Attorney General of Oregon has been authorized to bring proprietary actions on behalf of the state and its political subdivisions. There is no question of conflict with existing state law.

THIRTEEN QUESTION PRESENTED

How many antitrust suits has the atttorney general's office of your state brought in recent years on behalf of the state or political subdivisions as a direct purchaser? How many parens patriae suits has the attorney general's office brought since the Illinois Brick decision?

ANSWER TO THIRTEENTH QUESTION PRESENTED

One case is currently being pursued by the attorney general, acting as parens patriae, on behalf of direct purchasers of residential water well-drilling services. The only parens patriae suit currently in litigation, that being In Re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (MDL-150) was filed prior to the Illinois Brick decision.

FOURTEEN QUESTION PRESENTED

To what extent have the injured consumers benefitted directly from amounts you have recovered in parens patriae actions? What percentage of these recoveries have been refunded to consumers, and what percentage has constituted general revenue to your state?

ANSWER TO FOURTEENTH QUESTION PRESENTED

As of the present date, Oregon has received no moneys in settlement or other termination of parens patriae cases.

Oregon is, however, currently prosecuting a parens patriae claim on behalf of its citizens in In Re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, (MDL-150), United States District Court for the Central District of California. In addition, we are currently involved in potential parens patriae litigation involving water well-drilling services in Southern Oregon.

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STATEMENT
OF
ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS
BEFORE SENATE JUDICIARY COMMITTEE

Mr. Chairman, members of the committee: I am pleased to appear on behalf of the State of Kansas and my fellow members of the National Association of Attorneys General in support of "The Taxpayer Antitrust Enforcement Act of 1983" (S.915). Six years ago tomorrow, the Supreme Court decided the case of Illinois Brick Company v. State of Illinois; antitrust violators have profited since that date.

The Court in that case ruled plaintiffs generally could not recover civil damages from antitrust conspirators unless their contracts were directly with the conspirators. This decision has granted immunity to many antitrust violators who market their goods through middlemen. S.915 again would give taxpayers and citizens, through the states' attorneys general, the ability to seek redress from antitrust violators who are currently exempt by virtue of having marketed their products through middlemen to states, political subdivisions, and their citizens.

When I first took office as Attorney General of Kansas in 1979, I had a very limited background in antitrust law. I had been a trial court judge for 13 years and, frankly, there just was not an abundance of antitrust cases filed in my court. Illinois Brick was just the name of another case. I soon learned how detrimental an impact it could have. At that time, January 1979, the antitrust division in the Office of the Kansas Attorney General had six suits on file involving substantial damages. All six were multi-district cases which required the expenditures of a great deal of time and huge sums of money. In one case, Petroleum Products, a substantial portion of Kansas' damages were based on indirect purchases. After weighing the impact of the

Illinois Brick decision, I decided we could not afford to pursue this case any longer. I entered into a settlement agreement with the defendants, whereby we recovered our expenses to that date (some $80,000), and dismissed our case with prejudice. Four of the remaining cases were settled for amounts much smaller than their true value due to Illinois Brick, and one, Cement, is still pending.

Kansas has been involved as a plaintiff in complex antitrust cases that were resolved prior to the Court's decision in Illinois Brick. In one of those cases, In re Antibiotic Antitrust Action, the State and thousands of Kansans benefited from the proceeds of a settlement fund obtained from five major drug companies. All told, approximately $6.5 million was returned to the State and its citizens. This figure would have been reduced by at least half had Illinois Brick been the law in the early 1970s when this case was resolved. It is also interesting to note that if Illinois Brick had been decided before the Antibiotic cases, one consumer could have purchased a pill from a conspirator and recovered damages. Another consumer could have purchased an identical pill, but not have been allowed to recover, only because the pill passed through the hands of a middleman before it was purchased.

Simply by dealing through middlemen, a violator may avoid payment of damages. It seems quite fallacious to assume in each instance that a middleman, after learning of a violation, would sue the violator. This is a truism primarily because he will virtually always pass on the overcharge to those purchasing from him. Secondly, in many instances it is improbable that this same middleman would sue his source of supply and jeopardize his livelihood. Therefore, unless the purchaser is able to sue the conspirator, the conspirator is free to reap the benefits of an unlawful act.

In very recent contact with our State Purchasing Department, we were advised that 90 percent of the State's purchases are from middlemen who are not typically the antitrust violators. Our office has developed an assignment which sellers are required to sign when they sell products to the State. This clause in the contracts assigns to the State any right of recovery that the seller may have as a result of antitrust violations. This probably will work fine if the purveyor the State buys from is the first purchaser, but in many instances there are multiple middlemen. In those cases we are in the same position as we would be without the assignment. And, I say "probably" because I am not aware of any court cases where the validity of these assignments has been tested.

Kansas is not a large state and, as a result, we don't have some of the problems visited upon our more populous sister states. However, it seems we are not immune from antitrust violations. For the past year and a half, we have been involved actively in the pursuit of civil damages in highway bid-rigging activities. In these cases, we have recovered nearly $5 million so far, and there are several investigations still pending. These, of course, did not involve matters that are affected by Illinois Brick, but it does illustrate the point that smaller states, as well as those with large populations, are victims of antitrust violators. In that same vein, the states and their political subdivisions purchase everything from "nuts and bolts" to all types of food products, and those purchases are made with dollars that are derived from taxes. The people who pay those taxes have every right to expect that they will get their money's worth. When the state gets cheated, the taxpayers are cheated. Additionally, states' attorneys general may sue on behalf of their citizens for their consumer purchases. The role of the states' attorneys general is to protect taxpayers and citizens alike.

if a defendant can prove any overcharge had been passed on by the plaintiff, then that plaintiff will not be allowed to recover for that amount. The subsequent indirect purchasers who are entitled to be represented by an attorney general will become indispensable parties to the case. This section would eliminate any possibility of duplicative recoveries or multiplicity of suits.

Though S.915 is a compromise of previous bills, it would allow the states' attorneys general to recover for damages caused by violators of the law, even if those violators pass the product through the hands of a middleman. The Supreme Court's interpretation of the law benefits only the law breakers. I ask you, on behalf of the taxpayers and citizens of Kansas and the other states, to correct this discrepancy in the law.

The Supreme Court, in Illinois Brick, has given violators a method by which they may avoid payment of damages, a method by which they may cheat the taxpayers and citizens and escape scot-free. If the laws against conspiracies, bid-rigging, and price-fixing are to be enforced, and our citizens are to be protected from this illegal activity, the Congress and the President must provide the proper authority to the Attorneys General.

Before concluding, I believe Section 2 of S.915 warrants comment. This portion of the bill resolves the major objections to this legislation. It provides in essence that

PREPARED STATEMENT OF CHARLES M. OBERLY, III

My name is Charlie Oberly, and I am the Attorney General of Delaware. I appreciate this opportunity to appear before you to give testimony in support of legislation aimed at benefiting the taxpayers of my state, as well as those taxpayers and voters in your states.

Prior to becoming Attorney General of Delaware on January 3 of this year, I was not involved in the practice of antitrust law and, as many other lawyers and consumers, had only a vague perception of their philosophy and application. The Illinois Brick decision of the Supreme Court was merely a case name.

Since my election as Attorney General in Delaware, I have learned a great deal about the Illinois Brick decision. The overwhelming response from every attorney general in the United States who I have spoken to, Democrat, Republican, North, South, Liberal and Conservative, has been a whole-hearted support of immediate enactment of legislation which would reverse the adverse affects of the Illinois Brick decision. We believe that the case was decided incorrectly. The Supreme Court itself suggested that Congress reverse, by legislation, the technical result which the Court reached.

More importantly, the public policy result of the Illinois Brick decision is totally unacceptable because it has prevented the states from recovering damages to their treasuries by price fixers. We have estimated that approximately 90% of the purchases of state governments are made through middle-men and therefore few actions can be brought on behalf of the states for violations of the antitrust laws. Under Illinois Brick, the Supreme Court would have us rely on the enforcement and zeal of the middleman who, in the majority of cases, pass on to the ultimate purchaser, dollar for dollar, any overcharges which he incurrs. The state, therefore, is denied the full right to recover full damages for itself and its citizens from the antitrust violator. Neither I, nor my colleagues, can place great reliance on enforcement by those who suffer no injury, who profit from violations through application of fixed percentage mark-ups, or who are captives of the supplier-violator and dare not endanger a fragile source of supply.

I would like to read to you an editorial which was run over four years ago in the Baltimore Evening Sun. The editorial states:

> "What happens when a customer victimized by an antitrust conspiracy decides to pass along the injustice, chain letter style, to his customer? Nothing, says the Supreme Court. This is the effect of its 1977 ruling in the Illinois Brick case. Contractors bilked by price fixing brick manufacturers simply absorbed the higher costs and passed them on to several communities which were their customers. But the communities, the ultimate victims, were declared by the Court to have no standing."

Although a simplification of the Illinois Brick decision, this editorial is correct in addressing the problem: taxpayers who have ultimately paid for state purchases have no right of recovery for 90% of the purchases made by the state. In light of Illinois Brick, the State of Delaware would have standing to recover possible over-charges on less than 10% of its purchases.

Before I became the Attorney General, the State of Delaware had made several antitrust recoveries, especially in the 1970's prior to Illinois Brick. A good example is the Master Key litigation which was a Sherman Act case for price fixing by manufacturers of finished hardware and master key-systems. The hardware was sold indirectly to large numbers of governmental entities as well as private contractors. The case was settled during trial in September 1976. In May 1979, a total of $80,146.88 was distributed to Delaware entities. These entities included cities, counties, school districts and hospitals in Delaware, as well as the State itself. Because these governmental entities were indirect purchasers, not one penny of this recovery would have been made if Illinois Brick had been law.

Given the scales of justice and the advantages and disadvantages to repealing the Illinois Brick decision, I feel that taxpayer's interest would be more adequately represented by repealing the Illinois Brick decision. The fears of frivolous lawsuits and debilitating litigation arising out of a broad repeal of the Illinois Brick decision have prompted the co-sponsors of Senate Bill 915 to limit the objectives of their bill to only partially overturn the Illinois Brick decision.

I realize there have been reservations about prior Illinois Brick legislation. The present bill goes a long way towards addressing the concerns which many Senators have expressed in the past.

As introduced, the bill limits the number of potential plaintiffs to the state attorneys general and to the Attorney General of the United States; thus, only responsible governmental officials will be in a position to recover misspent tax monies on behalf of their citizens. This provision helps to insure that large complicated and frivolous cases are not brought under the aegis of the antitrust laws by aggressive plaintiff class action attorneys. Instead, elected officials will be required to carefully investigate and examine a case prior to bringing an action with the fear that any case which is not sound will result in public money's going to pay for huge costs and attorneys fees bills. Senate Bill 915 deals only with hard core Sherman Act Section 1 violations, price fixing and bid rigging; thus, limiting any broad use of the antitrust laws and focusing the enforcement efforts of government officials on the most egregious violations of the antitrust laws.

Senate Bill 915 also guarantees that the defendant will not be subjected to multiple liability by allowing the defendant to plead as a partial or total defense that the plaintiff has passed on to others who are themselves entitled to recover some or all of plaintiffs damages; thus, some reservations expressed by previous opponents of Illinois Brick legislation have been remedied and any defendants found guilty of antitrust violatins brought by governmental officials would not face multiple liability. This provision to avoid multiple liability to a defendant serves to streamline the approach and avoid some of the complexities of the antitrust laws. I believe that the co-sponsors of Senate Bill 915 have taken into account the major concerns expressed in the past in opposition to Illinois Brick repeal legislation. Senate Bill 915 is very fair to anyone accused of violating the antitrust laws and goes a long way towards remedying the problems created by Illinois Brick.

At a time when government is under pressure to rein in excessive expenditures, to be accountable, to achieve the maximum benefit from each dollar spent, Illinois Brick stands as a roadblock to state governments' efforts to protect taxpayers' interests.

It is the taxpayer who demands fiscal control.

It is the taxpayer who demands that government discharge its responsibility by protection of its fiscal integrity.

Our state governments must continue to provide essential services--to build roads, hospitals and schools.

The costs of these services will be borne by each taxpayer. Will they have assurance that they are getting a fair return? It is the taxpayer who demands passage of this legislation.

I strongly urge you to support Senate Bill 915 and benefit the taxpayers who would rather see their elected officials recover illegally obtained funds than pay additional taxes to companies who might now be violating the antitrust laws with little chance of being punished.

Prepared with assistance from Vincent M. Amberly, Deputy Attorney General in charge of Antitrust and Consumer Affairs.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE
STATE OFFICE BUILDING
820 N. FRENCH STREET, 8TH FLOOR
WILMINGTON, DELAWARE 19801

CHARLES M. OBERLY III
ATTORNEY GENERAL

DIRECT DIAL

November 25, 1983

The Honorable Senator Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: S. 915: Taxpayer Antitrust Enforcement Act of 1983

Dear Senator Thurmond:

I am responding to the question which you forwarded to me with regard to S. 915, the "Taxpayer Antitrust Enforcement Act of 1983." I have enclosed my responses to these questions so that they may be included in the hearing record.

If I can offer any further assistance with regard to this legislation, please feel free to contact me.

Sincerely,

CHARLES M. OBERLY, III
ATTORNEY GENERAL

CMO,III/dq

Enclosure

RESPONSES OF CHARLES M. OBERLY, III ATTORNEY GENERAL STATE OF DELAWARE

FIRST QUESTION PRESENTED

Would Section 4(I) of S. 915 allow defendants in all Clayton Act Section 4 actions to assert as an affirmative defense the pass-on occurred to states and/or consumers? If so, would it be possible for a defendant to obtain the joinder of all fifty attorneys general and the U.S. Attorney General as indespensable parties?

ANSWER TO FIRST QUESTION PRESENTED

S. 915 provides that the defense of pass-on should be set forth as an affirmative defense in any responsive pleading filed by the defendant. Such defendant must set forth in the pleading with as much particularity as is reasonable the identity of those to whom the defendant asserts that plaintiff has passed on some or all of plaintiff's damages.

On its face, it would appear that a defendant could attempt joinder on any state having a secondary or ultimate consumer to whom costs could be alleged to have been passed on. However, it is important to remember that an allegation is only that--an allegation. In an appropriate case, a State Attorney General or the Attorney General of the United States could probably quickly extricate himself and his state, or the United States, from such an acation.

In addition, many non-class action antitrust cases are brought between single parties on either side of the litigation in closely-defined geographical areas. Accordingly, it would be unlikely in such cases that the attorneys general of all 50 states and the U.S. Attorney General could be joined as indespensable parties.

Further, Fed. R. Civ. P. 19(d) provides that the joinder provisions of Rule 19 are subject to the class action provisions of Rule 23. It is such cases, in my opinion, that joinder of a large number of attorneys general is likely to become an issue. Since such joinder would be subject to the provisions of Rule 23, any attorney general, either of a state or of the United States, could avail himself of the benefits of Rule 23(a), for the purpose of defeating his active participation. In addition, pursuant to Rule 23, the attorney general of any state may have "opt-out" rights.

In addition, under Fed. R. Civ. P. 19(a), if a state attorney general should join as a plaintiff but he refuses to do so, he could be made a defendant or an involuntary plaintiff. In addition, if the joined party objects to venue and his joinder would render venue improper, he should in fact be dismissed from the action in accordance with the terms of the rule.

The terms of S. 915 and Fed. R. Civ. P. 19(b) appear to be somewhat in conflict. In my opinion, any attorney general could make a relatively good case that because of that conflict, no defendant should be permitted to require the joinder of all 50 State Attorneys General or the Attorney General of the United States. It is my view that, faced with the issue, the courts would employ a more conservative approach, and would in fact permit the lower courts to determine, pursuant to Rule 19(b), whenever joinder is in fact feasible.

SECOND QUESTION PRESENTED

Do you believe such an arguably broad repeal of the Hanover Shoe opinion will have an effect on the incentive of direct purchasers to sue for antitrust violations? Would direct purchasers be deterred from suing because of the complexity and delay resulting from one or more State Attorneys General being joined to represent indirect purchasers?

ANSWER TO SECOND QUESTION PRESENTED

There can be no question but that a repeal of the Hanover Shoe decision will have some effect on the incentive of direct purchasers who have "passed on" their damage to sue for antitrust violations. However, as has been pointed out by numerous State Attorneys General in the wake of the Illinois Brick decision, the true incentive to sue does not lie in the bailiwick of the direct purchaser from the price-fixing defendant, but rather such incentive and right to relief should, and does, lie in the indirect purchaser, who is generally the victim of pass-on.

In any event, the disincentive to the direct purchaser is certainly no greater than that which is posed by Illinois Brick with regard to the indirect purchasers, the parties actually damaged. It simply does not make sense for a direct purchaser from his sole supplier to engage in internecine warfare with that sole supplier, when he has in fact passed on the damages to the customer.

There can be no question but that antitrust cases can become complex and protracted. However, since the Sherman Act was passed in the late 1800's many cases have been brought in which the plaintiffs, defendants and the courts have successfully dealt with the complex nature of the litigation. I believe that, regardless of the complexity involved, those who have engaged in conspiracies to fix prices or otherwise restrain trade should be held responsible to those who are ultimately injured by such activities.

THIRD QUESTION PRESENTED

While S. 915 limits indirect purchaser recoveries to States and the Federal government, would the effect of price fixing, for example, still have to be traced through each distribution level in order to determine the extent of injuries suffered by the Federal government, States, or their citizens?

ANSWER TO THIRD QUESTION PRESENTED

The burden of proving pass-on of damages to the consumer of any state, or to the state itself, lies upon the Attorney General of any of those states who choose to bring suits alleging violations of the antitrust law and injury to their citizens or to their states. Any Attorney General bringing such an action would certainly have to stand ready to trace through each distribution level the nature of damages suffered by the state or by its citizens. Particularly in cases brought on behalf of the state, or its political dubdivisions, such pass-on issues may not be particularly difficult, as large contractors who work for large political subdivisions or the state itself may often be direct purachasers or may be only one-step indirect pruchasers.

FOURTH QUESTION PRESENTED

If proposed Section 4(I) raises the possibility that a State Attorney General will frequently be pulled into private antitrust litigation by virtue of the defendant's assertion of a pass-on defense, do offices of the various State Attorneys General have sufficient resources to participate in such litigation.

ANSWER TO FOURTH QUESTION PRESENTED

It is rare indeed that the office of any given State's Attorney General would have sufficient resources within their antitrust divisions or sections alone to bring major federal litigation such as the Petroleum Products Antitrust Litigation (MDL-150), the Cement and Concrete Antitrust Litigation (MDL-296) or the Mid-Atlantic Toyota Antitrust Litigation (MDL-456). In such situations, State Attorneys General and their staffs often enter into "cost-sharing agreements", in which the various states pledge resources, both in terms of attorneys, paralegals and investigators as well as cash to fund the litigation. To the extent that Attorneys General of various states are joined as indispensable parties in cases in which they have an interest, it can be expected that the State Attorneys General will continue to work together, as they have in the past, using shared resources to represent their states's public entities and citizens.

In any event, it is my opinion that an Attorney General could avoid above participation in some cases, upon a good-faith determination that active participation in those cases is not in the state's best interests. In such cases, liaison counsel and others involved may well be willing to represent the interests of the state or its political subdivisions or citizens on a contingent-fee or other basis. To the extent necessary, such services could be employed.

FIFTH QUESTION PRESENTED

What is the practical effect of a State Attorney General being deemed an "indispensable party" under Rule 19 of the Federal Rules of Civil Procedures? Must the case be dismissed if the State Attorney General cannot be joined?

ANSWER TO FIFTH QUESTION PRESENTED

As earlier stated, there is some inherent conflict between Rule 19 and S. 915.

On the face of S. 915, it would appear that the Attorney General is to be deemed an indispensable party.

However, Fed. R. Civ. P. 19(b) simply provides that an action should be dismissed if the court regards the absent person as being "indispensable." In making that decision, the court is to determine "whether in equity and good conscience the action should proceed among the parties before it...." In making that decision, the court is to consider (1) to what extent a judgement rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgement, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgement rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

It would be the position of this office that S. 915 and Fed. R. Civ. P. 19 would necessarily have to be read together so as to avoid dismissal of actions where a State Attorney General, for reasons of venue or otherwise, cannot be joined. It is our belief that the court should still have authority under Fed. R. Civ. P. 19(b) to determine whether the case should proceed in the absence of any particular Attorney General.

Further, Rule 19(d) specifically provides that the joinder provisions of Rule 19 are subject to the provisions of Fed. R. Civ. P. 23, dealing with class action litigation. Once the court enters into consideration of Rule 23 class action propriety, an entirely different set of rules apply with regard to joinder, and the Attorney General may avail himself of Fed. R. Civ. 23(a), to avoid the claim, or may properly opt out of the litigation.

SIXTH QUESTION PRESENTED

Section 4(I) of S. 915 would allow a defenant to utilize a pass-on defense "in order to avoid duplicative liability...." Does this mean that there must have been a previous finding of liability with regard to that particular defendant?

ANSWER TO SIXTH QUESTION PRESENTED

No. S. 915, and the provisions therein which would essentially overrule the Hanover Shoe opinion of the Supreme Court of the United States, is geared to solving the problem which the Illinois Brick court saw as having arisen in the wake of Hanover Shoe; i.e., that a given antitrust defendant could find itself being sued by purchasers at various levels of a distribution chain in various courts, thereby creating the danger of duplicative liability. S. 915 attempts to solve this problem by essentially requiring that all potential claimants in the chain of distribution be present in the same district court (or in the same multi-district litigation proceeding). In such situations, it is my opinion, and the expressed opinion of those sponsoring S. 915, that problems of duplicative liability can be avoided. A previous finding of liability is neither contemplated by S. 915 nor necessary to its application. The purpose of S. 915 is to require that all parties having an interest or potential interest be before the court so the court may properly apportion the appropriate treble damages among the various plaintiffs in the chain of distribution.

SEVENTH QUESTION PRESENTED

Under S. 915, if the State Attorney General were to bring a *parens patriae* suit which was litigated to judgment before a suit was brought by a direct purchaser, would the first purchaser be bound by the results in the prior suit? Does the language of section 4(I) assure that there will not be multiple recoveries and inconsistent judgements in such situations?

ANSWER TO SEVENTH QUESTION PRESENTED

It is my understanding that the median time from filing to ultimate conclusion of a federal antitrust case is approximately 4.4 years. Because the statute of limitations for antitrust claims for relief is just 4 years, and because there is no provision tolling the statute of limitations when a State Attorney General brings an action, it seems unlikely that a *parens patriae* case would be litigated to judgment before suit is brought by a direct purchaser. To the extent that multiple parties make claims for relief based upon the same antitrust conspiracy, such cases should be properly transferred by the Judicial Panel on Multidistrict Litigation to a single forum for suit. In such a situation, all parties plaintiff will receive their appropriate portion of damages, and all parties defendant will be assured that they will not be the victims of duplicative recovery.

EIGHT QUESTION PRESENTED

The Supreme Court in *Illinois Brick* discussed at great length the complexities of proving indirect purchaser claims. Aside from limiting the number of plaintiffs who may bring indirect purchaser suits, how does S. 915 address the procedural and practical problems inherent in such suits as identified by the court?

ANSWER TO EIGHT QUESTION PRESENTED

As I have noted earlier, S. 915 is not a panacea for those who would avoid the procedural and practical problems inherent in federal antitrust litigation. Those Attorneys General who file such litigation should expect to be prepared to have their staffs trace damages through the various levels of distribution. With regard to procedural problems, such problems are only as great as the parties and the court choose to make them; there have been many cases in which a strong federal judge can move a case through to completion in a relatively short time, as well as cases where judges who are not as strong may find the cases moving much more slowly and in a much more cumbersome fashion.

NINTH QUESTION PRESENTED

Has your State recently updated its own antitrust laws? More specifically, has your State enacted any changes in its antiturst laws to address the problems you feel have been created for the States by the *Illinois Brick* decision? How many suits has the Attorney General's office brought in recent years under State antiturst law?

ANSWER TO NINTH QUESTION PRESENTED

In 1979, the Delaware Legislature authorized the Attorney General to bring *parens patria* claims on behalf of Delaware's natural citizens. 6 *Del. C.* 2108(b). However, no legislation has been enacted by the state legislature for the purpose of curing *Illinois Brick* problems. The Delaware Supreme Court has not yet been faced with the question as to whether it should adopt the rationale of the *Illinois Brick* court with regard to cases brought pursuant to state antitrust laws.

In recent years, the Attorney General's office has brought twelve (12) suits in state court and filed pendant state claims in four (4) federal antitrust cases.

TENTH QUESTION PRESENTED

It is my understanding that States can include in their contracts with suppliers and contractors assignment clauses which would assign to the States any right of recovery which the seller might have as the result of an antitrust violation. Does your State require that such assignment clauses be included in contracts? To what extent do such clauses resolve the problem which States face in bringing proprietary suits in direct purchasers?

ANSWER TO TENTH QUESTION PRESENTED

Our State does not require that such assignment clauses be included in State contracts. State agencies have been advised to and, in fact, some agencies do use contract forms which require assignments of antitrust claims to the agencies from the direct sellers. Since such direct sellers may or may not be first purchasers from a co-conspirator, the assignment clauses are of dubious value.

The extent to which such clauses resolve the State's problems in bringing proprietary suits as indirect purchasers is at this point untested in the courts. However, I am concerned that on may occasions those who sell to the State are not in fact direct purchasers, and therefore the assignment clauses are of little value.

ELEVENTH QUESTION PRESENTED

Attorney General Stephan indicated in his written testimony that assignment clauses are only useful if the State buys from the first purchaser. What approximate percentage of the time does your State buy from those farther down the chain of distribution thatn the first purchaser?

ANSWERS TO ELEVENTH QUESTION PRESENTED

The best estimates which we have received from state purchasing officials with regard to direct purchases by the State of Delaware and its agencies is that between 85 and 90 percent of Delaware's purchases are as an indirect purchaser.

TWLETH QUESTION PRESENTED

The proposed new Section 4C(a)(2) added to the Clayton Act by S. 915 directly authorizes the Attorney General of each State to bring proprietary actions on behalf of the State and its political subdivisions. Has your State authorized the Attorney General to bring such suits? If not, is it possible that this authorization in new Section 4C(a)(2) could conflict with existing law?

ANSWER TO TWELFTH QUESTION PRESENTED

Yes. Pursuant to 6 Del. C. §2105, the Attorney General of Delaware has been authorized to bring proprietary actions on bahalf of the State and its political subdivisions. There is no question of conflict with existing state law.

THIRTEEN QUESTION PRESENTED

How many antitrust suits has the Attorney General's office of your State brought in recent years on behalf of the State or political subdivisions as a direct purchaser? How many parens patriae suits has the Attorney General's office brought since the Illinois Brick decision?

ANSWER TO THIRTEENTH QUESTION PRESENTED

The Attorney General has brought six (6) suits on behalf of State or political subdivisions as a direct purchaser. Five (5) of these suits involved highway contacts (liquid asphalt) and one involved art materials. One case is currently being pursued by the Attorney General, acting as parens patriae, on behalf of direct purchasers of new 1980 model year Toyotas for price fixing. This suit is currently in litigation and was recently settled by the State with the defendants involved. See In Re Mid-Atlantic Toyota Antiturst Litigation (MDL-456).

FOURTEEN QUESTION PRESENTED

To what extent have the injured consumers benefited directly from amounts you have recovered in parens patriae actions? What percentage of these recoveries have been refunded to consumers, and what percentage has constituted general revenue to your state?

ANSWER TO FOURTEENTH QUESTION PRESENTED

The terms of the Toyota settlement provide for every purchaser of a new 1980 Toyota with a protective package to receive $135 in cash or $250 in goods and services (scrip) from an existing Toyota dealer at the consumer's option. The scrip will be usable for up to one year from when the checks will be mailed to consumers, probably in the middle of 1984. The entire recovery will go to consumers except for a small amount of out of pocket costs which will go to the State pursuant to the original settlement agreement.

Senator SPECTER. I call the next panel to testify: Hon. John Shenefield of Milbank, Tweed, Hadley & McCloy, Washington, DC; Harold E. Kohn of Kohn, Savett, Marion & Graf, P.C., Philadelphia, PA; Thomas L. Boeder of Perkins, Coie, Stone, Olsen, and Williams, Seattle, WA; and Edward D. Cavanagh, assistant dean and associate professor of law, St. John's University School of Law, New York, NY.

I am not sure we are correct in our use of "Honorable." I know Mr. Kohn has government service and probably is entitled to one as well. We would probably just as accurately describe each of you and your professional status as "the Honorable."

Proceeding from the designated sheet, I want to make that addendum to the calling.

Mr. Shenefield, you are listed first on the agenda, so let's begin with you.

STATEMENTS OF MEMBERS OF PANEL CONSISTING OF HON. JOHN H. SHENEFIELD OF MILBANK, TWEED, HADLEY & McCLOY; HAROLD E. KOHN OF KOHN, SAVETT, MARION & GRAF, P. C., PHILADELPHIA, PA; THOMAS L. BOEDER OF PERKINS, COIE, STONE, OLSEN & WILLIAMS; AND EDWARD D. CAVANAGH, ASSISTANT DEAN AND ASSOCIATE PROFESSOR OF LAW, ST. JOHN'S UNIVERSITY SCHOOL OF LAW, NEW YORK, NY.

Mr. SHENEFIELD. Thank you. Good morning.

It is a pleasure as always to appear in support of legislation that would address the problems created by the Supreme Court's holding in *Illinois Brick.*

I calculated that it was about 6 years ago that I first testified in favor of similar legislation and in light of all the hearings and law review articles, and debate, that have passed on the subject since that time, I think the problem can be reduced to a very simple statement: *Illinois Brick* and *Hanover Shoe* create an unfair situation and an unsatisfactory result by doing essentially two things. They deny any recovery to many truly injured persons; and second, they grant the exclusive right to sue to middlemen who in many cases will either sue and obtain windfall profits or not sue, and thereby allow some defendants to retain the fruits of their antitrust violations.

Senator SPECTER. If the middlemen sue, can they recover windfall profit? Aren't they limited to their own damages?

Mr. SHENEFIELD. No; they are not limited to their own damages. The defendant is unable to show that the middleman has in fact passed on the result of the price fix to the ultimate consumers down the line.

So, in effect, they are the——

Senator SPECTER. The defendant is precluded from that?

Mr. SHENEFIELD. That is correct.

Senator SPECTER. And the plaintiff does not have the affirmative burden of proving his own specific damages?

Mr. SHENEFIELD. Yes.

Senator SPECTER. What damages does the middleman show?

Mr. **Shenefield**. The entire overcharge resulting from the original price fix which is, of course, trebled. He also has what is then the duplicate recovery of having the benefit of the market mechanism downstream as a result of this passon. So he is now in fact given duplicative recovery.

Senator **Specter**. Has there been a surge of litigation by middlemen?

Mr. **Shenefield**. There has not been, and there is an interesting point, which is the second point I mentioned; namely, that many defendants——

Senator **Specter**. Where is the activity——

Mr. **Shenefield**. Many defendants will not be sued here because the middleman plaintiffs do not have the requisite incentives——

Senator **Specter**. Where is the activity of plaintiffs' counsel that Attorney General Olsen was referring to?

Mr. **Shenefield**. They would like to get legislation to deal with this problem. I will allow people who are more closely familiar with that portion of the bar to speak for themselves.

Senator **Specter**. Why wouldn't they like to get middlemen to deal with?

Mr. **Shenefield**. It may well be that since you pass on the results of the overcharge, you are not out any dollars yourself. Where is the incentive to sue, especially if, as must be obvious, you may have to go back to that same supplier next year, or especially in a time of shortage. Why, as long as you are not out any dollars, would you sue him now?

Senator **Specter**. It just surprises me that given the status of the law as you describe it, with the middleman having this claim for relief for very substantial damages, that there has been no such litigation.

Mr. **Shenefield**. It's surprising but it does tend to give the lie to the position in favor of the *Illinois Brick* decision that what is likely to happen is swift and sure retribution in the present situation.

You do not have swift and sure retribution in the present situation for the reasons I think I have suggested.

While I would have preferred, as the record shows, a broader bill, I would support this as a very modest compromise effort to deal with a fairly limited situation. It creates in effect a minuscule class of potential plaintiffs and thus avoids most of the problems that the Supreme Court saw, because of which they decided the *Illinois Brick* situation the way they did. The class of potential plaintiffs is really so small that the marginal burden cast on the judicial system in terms of some additional complexity is more than outweighed by whatever justice is brought to those indirect purchasers via these kinds of suits that would be authorized.

The benefits are three: first, injuries that are actually suffered by indirect purchasers may be to some extent redressed. Windfall to direct purchasers who have actually been compensated, as I suggested earlier, through the marketplace, are avoided and there is a realistic possibility that antitrust suits will be filed in circumstances where direct purchasers do lack incentive to sue.

In short, whether or not the original comprehensive *Illinois Brick* legislation that was discussed would have opened flood gates of litigation, as it was suggested at the time, it seems to me that concern certainly has no basis in fact under the present legislation. At anytime the Antitrust Division of the Department of Justice accounts for only a very small percentage of the antitrust litigation filed in this country. Last year 1,100-some suits were filed. Unfortunately, the Antitrust Division will bring no more than 80 or 90 suits a year. Therefore, you are relying on other mechanisms for redress and compensation.

To take seriously the goal of encouraging enforcement of the antitrust laws, the Congress must enact legislation along the line of S. 915. And I heartily recommend its enactment.

Senator SPECTER. Thank you, Mr. Shenefield.

We appreciate your testimony. We know of your extensive experience in the field.

Now, I call on Harold Kohn of the firm of Kohn, Savett, Marion & Graf, a very distinguished Philadelphia lawyer, who had brought the litigation in the antitrust field which gave me my first introduction, the famous truckers' suite.

Mr. Kohn brought a very famous antitrust action which he won in the district court, court of appeals, and established new law in the U.S. Supreme Court, and since that time, which was 1976, 1977, and 1978, beyond, and before that, he has established an international reputation in the field.

It is a pleasure to have you here.

Mr. KOHN. Senator, it is a pleasure to have the opportunity again to appear before this panel. I have been doing it for some 20 years and I think throughout that time my position has consistently been to promote the efficient enforcement of the antitrust laws.

I am very happy particularly that you are presiding because you are so kind. When you spoke about the new law being made, you neglected to say that I lost the case.

Senator SPECTER. It was inadvertant.

Mr. KOHN. That was the new law that was established.

Let me digress from the printed statement which I have submitted and which I ask to have incorporated into the record——

Senator SPECTER. It will be.

Mr. KOHN. To summarize what I think are the essential considerations here. In the first place, the private bar and the middlemen have not been inactive. If you will look at that printed statement, you will see on pages 2 and 3, some billion dollars of recovery in the last several years since *Illinois Brick*, so that *Illinois Brick* has not deterred effective enforcement against price fixers.

Second, I do not think, in view of that record, that there is any need unduly to complicate the enforcement of the antitrust laws, which is exactly what would happen if we went back again to the pre-*Illinois Brick* rules with the defendants playing off one group of plaintiffs against another.

I am not an economist. And my experience has shown that you can get economists, like many expert witnesses, to testify on all sides of almost any issue.

But, in theory, if the damage has been passed on by the middleman, the recovery also in the normal course of events, will likewise be passed on.

Senator SPECTER. Has it been passed on in these cases?

Mr. KOHN. Nobody knows. That is one of the esoteric issues that is eliminated, which is why I have said that the *Illinois Brick* decision was a windfall in the enforcement of the antitrust laws.

Perhaps I ought to explain. I have the utmost respect for the first five or six witnesses. It is really painful for me to have to disagree with people who are so wholeheartedly in favor of the effective enforcement of the antitrust laws, like the Senators, the attorneys general, and the Governor. I just think, though, that they have not had the experience in the field, that some of the rest of us have had. I have been prosecuting these cases for the past 20 years and I know what it is to try to prove damages in an antitrust case, and I know what it is when defendants can play one plaintiff off against another and when these cases can be protracted, as in the plywood case which was finally settled only after the Supreme Court granted certorari on the issue of damages. So I know what it is to have to deal with such problems, and I say, and I think my record is clear, that I have always supported effective enforcement of the antitrust laws. I say this would be a retrogressive step.

I am not against enforcement. I was one of the few supporters of the parens patriae legislation outside of the attorney general, and I think my testimony was helpful in getting that law passed.

What I want to do is to enforce the antitrust laws in a way that is effective, and not have a doctrinaire or academic bill that will not help you. One of the problems, as you know from my contribution in the past, one of the problems is when you have a bad law, it is difficult to draft a good act. I think that is one of the problems here is, and I have parsed it, chapter and verse of many of these—I think you have the same problem. If you will indulge me, I can explain.

Even if you were going to have a bill, this is not the bill you ought to have because it is essentially a poorly drawn bill. It starts off, "any State or political subdivision is injured in its business." What do you do about the District of Columbia? What do you do about authorities, which today are among the largest purchasers who would, if there were an antitrust conspiracy, be victimized?

What would you do with the Pennsylvania and New Jersey Port Authority, or New York and New Jersey, that have their port authority? Which of the attorneys general is going to maintain the suit under this bill?

As you know, they buy literally billions of dollars of merchandise, whether it be subway cars or any other items.

Turning to the next page, where you have, beginning on line 16, they have got this exactly backward. The problem is not that the State passes on the damages to somebody else who would have a claim. The problem is that somebody ahead of the State has sustained or has passed on damage. So what that section ought to say is that the people who are to be brought into the action are not those who succeed in the passage of title of a State, but those who preceded the State in passage of title.

I simply illustrate the fact, when you start out to accomplish a result which is ill advised, it is extremely difficult to draw a piece of legislation which will accomplish that result.

I do not want to get into any "Newspeak" problems, as we approach Orwell's 1984, but if you happened to see or hear CBS news last night, you remember some of the references to some of the phrases, such as "Peacemakers" for nuclear missiles. The Taxpayers' Antitrust Enforcement Act is a complete misnomer. The amount of money that would be realized by these States, and not that I denigrate any amount of money that would be helpful, but, as our old friend Mayor Dilworth used to say, it would be about enough.to rub in your hair.

If that is the argument they need to get this bill passed, then this bill need not be passed.

Actually more money is realized by simplifying the antitrust laws, and procedures. The Federal Government's 50 percent share is going to be greater than what the States would be recovering if they permitted this mishmash of judicial administration which will simply stymie all recoveries.

Now, I think the real problem of the States is not the kind of legislation we have, or the *Illinois Brick* decision of the Supreme Court. The real problem of these States is that the staffs they have to enforce the antitrust laws are inadequately compensated and their tenure is much too brief.

Mr. Boeder did yeoman service in his State, but you cannot stay there indefinitely with the kind of salary arrangement that exists. It has not been a question of law. It has been a question of the man and woman power, the capacity of the people doing the enforcement.

Similarly, in the Federal Government, the real problem today with antitrust enforcement is not the law. It is the Assistant Attorney General in charge of that division. If Mr. Shenefield were back there instead of Mr. Baxter, you would have three times the enforcement activities that you have in the United States today.

It is not a question of Republican or Democrat. The most efficient—what gave the impetus to all of the enforcement in the last few decades began in the Eisenhower administration under Republican Attorney General Rogers and Mr. Bicks, who was the Assistant Attorney General, that generated the electrical equipment case out of which all of the price fixing litigation came.

So I think these are the problems to which the Senate and the House ought to be directing themselves. You have been flooded during the past several years with ill advised efforts, mostly on behalf of industry, to gut the antitrust laws. It is time there was a moratorium on endeavoring to affect the antitrust laws by legislation. They have worked well for 90 years and there is no need for the House and the Senate, with all their myriad problems, to be spending the inordinate amount of time that you have been spending in attempts to pass amendments to the antitrust laws. This, although it comes from the opposite side, from the people opposing those proposed amendments, is just as ill advised, just as unnecessary and ought to be thrown into the wastebasket along with the other amendments.

Thank you.

It is a pleasure as always to appear before this committee and to discuss with you the antitrust problems.

Senator SPECTER. Just a couple of questions.

The essence of your testimony is that the standing which is left after *Illinois Brick* is sufficient in your judgment to enforce the antitrust laws.

Mr. KOHN. Absolutely.

And it has worked. The figures that I referred to in my presentation prove that.

Senator SPECTER. The cases which you listed on pages 2 and 3 were brought by direct purchasers?

Mr. KOHN. That is correct.

The plywood case was brought by direct and indirect. Judge Sam Pointer, who is probably one of the best judges in the United States——

Senator SPECTER. How did the direct purchasers maintain their standing?

Mr. KOHN. Judge Pointer, before *Illinois Brick*, decided it was too complicated to include indirect purchasers and he struck them out himself.

Senator SPECTER. All you were left with were direct purchasers?

Mr. KOHN. Yes, who recovered $175 million.

Senator SPECTER. What did they do with the money collected?

Was any of that money passed on to indirect purchasers who had sustained damages? Were you involved in that case?

Mr. KOHN. Yes, I was the lead counsel. Nobody really knows whether they pass it on but if the theory of the States is correct, that they pass on overcharges, then the theory of the State must be, by parallel reasoning, that they passed on, in the course of their business, that which is returned to them. Nobody will ever know.

That is the kind of esoteric examination that the Supreme Court said ought not to burden the Courts

Half of that, as Judge Pointer pointed out, will go for taxes.

Senator SPECTER. We will burden the Congress. I would be interested to know what would happen with that money because of what you are saying, is that the damaged parties got money, the indirect purchasers, and that factually is so then that would undercut a good bit of testimony which says the indirect purchasers are being victimized.

Mr. KOHN. Not if you accept the premise on which those people proceed who will permit the indirect purchasers to recover.

Their theory is that people operate at a certain profit level. If they receive or if they are charged more for that product, they will charge you more because they will have to maintain a certain profit level.

Well, equally, it seems, if they get money back which is a result of that overcharge, that refund will likewise be reflected by lower prices later on and——

Senator SPECTER. It sounds highly unlikely.

Mr. KOHN. That is why the Supreme Court said that they are not going to engage in this enterprise to determine how many angels dance on the head of a pin. Nobody will ever know the answers to those questions.

When you have these damage issues that have to be determined in antitrust cases. you do not proceed with the precise certainty with which you proceed in the physical world. You are engaged in an inquiry which is a problem of all political, political in the finer sense, political administration.

Senator SPECTER. What do you mean the finer sense?

Mr. KOHN. Nobody is running for public office. What you are trying to do is determine that somebody has violated the laws of the United States, how to adjust and all you can say is adjust the evil that has occurred. You delude yourself if you think you can ascertain damages with any degree of certainty.

In the plywood case, for example, we maintained that the damages were the difference between the so-called phantom rate and the actual freight, which is what the jury found. The Supreme Court granted certiorari because they said that the issue, according to the defendants, was whether the total price has been increased by that very obvious conspiratorial increase of the freight rate.

Where do you get when you get into that kind of inquiry? Are you going to examine whether every middleman passes on the damage, whether one middleman did, and another did not give the customer the break? What do you do in the corrugated container case where almost a half billion dollars is now in hand waiting to be distributed?

How much is each State going to get, and how much will each State be able to prove on damages on the carton of supplies, whatever it may be, paper goods, anything, that it received from the people who maintained that action and got the damages?

Senator SPECTER. Which court was that?

Mr. KOHN. That was in Texas.

That paper manufacturing company from Pennsylvania for example, is a member of the class which can recover in the corrugated box case because it bought corrugated boxes to ship its products, and so it is a plaintiff who gets the money. When it ships to the Pennsylvania government a carton of paper towels, how much is Pennsylvania going to get by way of the indirect damage that it suffered because of what was overpaid on that carton of paper towels?

Senator SPECTER. How are you going to distribute that half-billion dollars?

Mr. KOHN. The half-billion dollars is being distributed among the purchasers who bought the corrugated cartons. Now is Pennsylvania or some other State to have a right of action? If that had happened, there would have been no half-billion dollars recovered because the defendants would simply play one of those plaintiffs against the other and would have said to Scott Paper Co., when it tries to get its money: "What are you trying to get the money for, you sold this carton of paper towels to the State of Pennsylvania, so the State of Pennsylvania is really entitled to get some, if we can ever ascertain, some part of what you overpaid on the corrugated carton, because their prices for paper towels obviously has to include the price of the corrugated carton. As I say, you simply cannot administer law if you are going to require that kind of inquiry, because those cases will last forever.

If you have been—it is easy to sit in the State capitol and say the law ought to be changed but if you are out there in the court, you realize how impractical those changes would be.

Senator SPECTER. Thank you very much, Mr. Kohn.

You have certainly illustrated the complexity of our job.

Mr. Boeder, we welcome you and look forward to your testimony.

I would like to pursue this at much greater length. We always operate under time constraints.

Senator Thurmond left because he had a commitment at the White House, and he asked me to relieve him from 9:25 to 11:15, and there has been added onto my schedule a pleasant undertaking. The Philadelphia 76'ers are going to be at the White House and I am to escort them from the southwest gate at 11:35 to be followed by a reception at the White House, and Senator Thurmond is due to be back at 11:15, and he is at the White House now, and whether all of these schedules mesh or not, I do not know.

There are quite a number of questions, and if you gentlemen would stay beyond the time that the panel has concluded, I would appreciate it, because if Senator Thurmond returns, he may wish to ask questions or, in the alternative, in light of the testimony, the staff may want to present questions in writing.

But I will give you that little statement, notwithstanding the interest and the complexity of the question. There are a lot of questions in my mind but we really do have to proceed.

Mr. Boeder, we look forward to your testimony.

Mr. BOEDER. Thank you.

First of all, I would like to give you a very brief background so you will be able to assess the perspective which I bring to the problem.

I was an assistant attorney general for the State of Washington when Slade Gorton was attorney general for the State of Washington. I was there from 1970 until 1981, at which point I left and went into private practice.

Since that time, I have been working on an American Bar Association litigation section monograph to study parens patriae, and what the results or experience of the State attorneys general has been under the parens patriae legislation this has brought me back into contact with the *Illinois Brick* which was one of great concern to me in the later years, when I was in the attorney general's office.

I think it is fair to say that the effect of *Illinois Brick* on State antitrust enforcement has been nothing less than cataclysmic. The response which one most frequently gets from State attorneys general when you inquire as to why they have not been bringing parens patriae cases is that *Illinois Brick* has rendered the parens patriae legislation ineffective, except in very, very rare cases.

There was a time before *Illinois Brick* when I would sit literally and sometimes figuratively at the same table with Mr. Kohn, I representing a group of State and Mr. Kohn, of course, representing some direct purchaser plaintiffs. Before *Illinois Brick* I would be able to negotiate on behalf of the States and to fight in court for the State's share, and the consumers' share of those damages, and in cases like the tetracycline litigation, which was before my time, the States were very successful in obtaining their share of those damages and returning them to consumers and to hospital districts and other indirect purchasers.

The thing which I think has changed so dramatically after *Illinois Brick* is that the State attorneys general are no longer able to represent those indirect purchasers at the table with Mr. Kohn or in court, and that millions of dollars in recovery will go to the direct purchasers whether or not they are entitled to those damages. What the State attorneys general would like under this bill, and what I think they are entitled to, is the privilege of going into court and arguing with Mr. Kohn that they can prove the pass on, that they are entitled to those damages. We cannot really debate or pass on issues in each individual case here in testimony, but the basic unfairness of *Illinois Brick* is that it precludes the State attorneys general from even going into court and making that argument vis-a-vis Mr. Kohn, and I think that is essentially unfair.

Moving on, though, it seems to me that it is useful to point out that before *Illinois Brick* the State attorneys general and representatives of other indirect purchasers were indeed tackling the allegedly insurmountable problems of proving indirect purchaser damages, and that the people who were attempting to prove pass on in the settlement context or in court, saw no insurmountable problems in doing that. There are numerous cases like the *Master Key* and the *Tetracycline* litigation where results were accomplished.

The problem of proving indirect purchaser damages, from my point of view, both as an assistant attorney general and now as a private attorney, is no more insurmountable than numerous other problems routinely dealt with in antitrust litigation. They are no more troublesome than class action problems. They are no more difficult than proximate cause issues, standing and many other issues which can be just as troublesome as indirect purchaser problems. Yet by *Illinois Brick*, by fiat, those arguments on indirect purchasers are no longer able to be made.

I think it is ironic that the decision would come down when the attorneys general were becoming increasingly sophisticated in using computer techniques and in using economists' testimony in order to effectively prove indirect purchaser damages. Of course, all of that was short-circuited by *Illinois Brick*, and I believe that S. 915 would remedy that. I believe it is important that it be remedied.

There are several other points which were raised in questioning which I would like to briefly address.

One of the issues which you have raised, Senator Specter, is the question of why the States cannot use their State remedies to effectively resolve this problem; in other words, get legislation passed at the State level.

One of the responses to that is that in large cases, such as the *Tetracycline* case, the *Petroleum* case, on the *Fine Paper* litigation, are indeed nationwide cases. The attorneys general had gotten to the point in 1976 where they were able to work on these cases as a team, where they combined the resources in order to pursue national and, in some instances, international defendants. To take those cases now and put them back State courts into would make it virtually impossible in many instances for a State attorney general, with the resources of the single State's attorney general, to pursue such cases effectively.

One of the things which is instructive in that regard is that Kansas, for example, settled its aspect of the *Petroleum* litigation.

It was one of the States which was in a cooperative effort, among a number of State plaintiffs pursuing that case. Now that case is running into *Illinois Brick* difficulties which would massively affect the ability of the State to recover damages in that instance.

Turning to S. 915 itself, I too, like Mr. Shenefield, would say that *Illinois Brick* should be repealed outright, that indirect purchasers should have their day in court out of fairness. If they cannot prove their case. Then the case ought to be dismissed by the district court. But they ought not be barred before they get into the courtroom.

But S. 915, while it is limited, is an an important first step to remove the *Illinois Brick* bar. It is a moderate proposal that addresses many of the perceived problems. I say perceived because, Senator Specter, I do not believe that the difficulties of proof and the kinds of problems that were raised as justifying *Illinois Brick* are legitimate objections in the sense that they cannot be surmounted. They are just another aspect of proof in an antitrust case. But in any event, this is focused. It is limited and I think it is an effective first step.

Thank you.

Senator SPECTER. Thank you.

Your long association and tenure with Senator Gorton was beneficial, I am sure.

I would like to call on our next witness, Mr. Edward Cavanagh, assistant dean and associate professor of law at St. John's University School of Law

Mr. CAVANAGH. Thank you.

I appreciate the opportunity to be here and be heard on the proposed legislation.

Since 1982 I have been assistant dean and associate professor of law at St. John's University School of Law in New York City. For nearly 8 years prior to that, I was engaged in the private practice of law.

I spent 4 years at the New York City firm of Donovan, Leisure, Newton & Irvine, where I concentrated in antitrust litigation. Among the matters I spent most of my time on were the *Tetracycline* litigation and the *In Re Uranium Antitrust Litigation.*

I presently teach in the antitrust field and have also published in that field.

I would like to stress that the remarks I make today reflect my own views and not those of any organization to which I belong, or the university with which I am affiliated.

Senator, I have a prepared statement which I would ask be made a part of the record.

Senator SPECTER. Yes, it will be.

Mr. CAVANAGH. I would like to respond briefly to a couple of points that were raised.

It seems to me that proponents of this legislation brush aside the serious practical problems involved in proving indirect purchase claims, particularly consumer claims. We spoke of tracing, tracing the overcharge through each and every link in the chain of distribution. This is an enormous practical problem. What it involves is looking at the price output decisions of middlemen throughout the chain of distribution. You may have four or five people between the manufacturer and the ultimate consumer. An example of what a mind-boggling process this is is well illustrated by Judge Higginbotham's opinion in the *In Re Beef Industry Antitrust Litigation,* 542 F. Supp. 1122, which is attached as attachment A to my statement.

I think, looking at that chart, you can see difficulties that one would have in flagging an overcharge through the chain of distribution. What is going to be involved in tracing, Senator, is likely to be an analysis economic decision of various middlemen who are not parties to the litigation and who have no stake in its outcome.

I suggest this is going to further complicate litigation and make it much more expensive for all involved.

Another serious problem that proponents seem to make light of is double recovery problems. It seems to me there is a very real problem of double recovery should a direct purchaser sue after a parens patriae case has gone to judgment, and the doctrines of res judicata and collateral estoppel will not apply because the direct purchaser was not a party to that litigation, and unless you are a party to that suit, you cannot be bound by it under the present laws as interpreted by the Supreme Court in the areas of collateral estoppel and res judicata.

I would like to underscore my belief that *Illinois Brick* was properly decided. I think it strikes a fair balance between the twin goals of antitrust enforcement: deterrence and compensation. It is not a perfect solution by any means, but what it has done is bring order out of the chaos that prevailed in complex litigation prior to the date of that decision where you had indirect purchaser claims being asserted together with direct purchaser claims, and having the courts being stumped as to exactly what to do with these. The *Illinois Brick* case brings some certainty to antitrust litigation. It also enables the judge handling the case to effectively handle the case he is involved in.

For example, in indirect purchaser claims, they can be handled on summary judgment motions or partial summary judgment motions, which means that the matter is decided without trial. Should *Illinois Brick* be overruled, it will be impossible to decide indirect purchaser claims without going through a trial and going through to determine the tracing issue.

Next, as has been suggested before, I do not think there is any logical basis here for singling out parens patriae cases as being types of indirect purchaser cases that we are going to permit to proceed. It seems to me if you are going to permit passing on for ultimate consumers, why not permit it for retailers or other people that might be end users, who may prove passing on. It seems to me unfair to tell such end user that that end user cannot recover

Finally, Senator, I would like to underscore the fact that I think it would be a serious mistake to overrule *Hanover Shoe. Hanover Shoe* is a proplaintiffs decision. It seems that if S. 915 is passed, and will permit the pass-on defense, the case will rare where the pass-on defense is not asserted. This will enable deep pocket defendants to wait out their relatively shallow pocket plaintiffs by making discovery lengthier and more expensive and it may be that the plaintiffs in such cases will not have the staying power to litigate a case until the end. It also seems to me that there will be a tremendous incentive for defendants to delay more now than before.

Senator, some witnesses here have suggested today that the tetracycline case is an example of how indirect purchaser claims can be amicably resolved Having worked on that case, I think that is wrong. It seems to me that the tetracycline case illustrates the utter impossibility of trying in one forum direct and indirect purchaser cases.

We had 166 cases brought. Most of them were settled for amounts in excess of $250 million. Nevertheless, there was never a litigated judgment against the defendants which found them liable for an antitrust conspiracy. In the final analysis, when six consolidated cases did go to trial before Judge Lord in the district of Minnesota, after 18 months of trial, trial time where there were 7 actual months of trial and 136 volumes of testimony, Judge Lord declared a mistrial and said that the jury was irritated, bored, and confused and could not possibly reach a fair verdict based on the evidence.

Senator SPECTER. Joseph Lord?

Mr. CAVANAGH. Miles Lord.

Senator SPECTER. Which court?

Mr. CAVANAGH. District of Minnesota.

Senator SPECTER. The jurors were bored——

Mr. CAVANAGH. Irritated and confused.

Senator SPECTER. How does that jury distinguish from any other jury?

You cite Judge Higginbotham and an F. Supp. citation.

How did he—was it a——

Mr. CAVANAGH. That is Patrick Higginbotham then of the Northern District of Texas. He has since been elevated to the fifth circuit.

Thank you, Senator.

Senator SPECTER. Thank you very much, Mr. Cavanagh.

We have been joined by the distinguished Senator from Alabama, Senator Heflin.

Senator HEFLIN. I just arrived and need to be apprised of what is going on.

Senator SPECTER. So far I am accurate in my statement, you have joined us.

We are up to the last panel.

I must depart.

Thank you very much, gentlemen.

[Pause].

The CHAIRMAN [presiding]. Mr. Shenefield, we are glad to have you. I believe you already presented your testimony while I was at the White House.

I have a few questions that I would like to propound to you.

In your written statement you reported House testimony given by Prof. Philip Areeda, suggesting that *Illinois Brick* and *Hanover Shoe* created an unsatisfactory result.

I would note, however, that in the same testimony, Professor Areeda went on to say this, and I quote:

> The Court was by no means happy with *Illinois Brick* results but was driven by the difficulties of tracing damages down the line on the distribution chain and by

> the grave dangers of duplicative recoveries each trebled. To escape these difficulties, it adopted the simple solution of allowing the first purchaser to recover the full amount of the overcharge. Now that solution may be too simple, but Congress, it seems to me, would not responsibly fulfill its role in the law-making process if it replaced it with an equally simple negative that failed to address the problems that the Court felt it could not handle. A responsible legislative process would focus on the two problems the Court identified and find ways to solve them. The proposed legislation seems either to deny the existence of those problems or to sweep them under the rug by telling the Courts to try harder to solve them on their own.

Now, given Professor Areeda's concern regarding the tracing of damages and duplicative recoveries, how does the current bill solve these problems?

Mr. SHENEFIELD. Senator, the problem is this——

The CHAIRMAN. Or do you suggest some modification of this bill, or do you suggest some other proposal?

Mr. SHENEFIELD. The balancing the Congress must engage in is to determine the extent to which additional complexity in the courts is outweighed by or outweighs fairness to plaintiffs who are not now able to go into court.

Professor Areeda was addressing a bill that was far more comprehensive and held the promise of far greater complexity than this narrower, much more modest compromise bill. While it might have been appropriate at the time to resolve that balancing against new legislation, it is desirable to resolve it now in favor of this legislation. This legislation is not perfect and the eminent jurist, Harold Kohn, has suggested a number of things that might be done to improve it. All of those ideas have been analyzed comprehensively in the last 6 years. I think this committee and its able staff could probably enrich the legislation somewhat, get around some of the procedural problems that Mr. Kohn pointed out, and on balance achieve a more just solution than the *Illinois Brick* decision leaves us with now.

The CHAIRMAN. Anyone can answer the next question.

If you want to answer, just raise your hand.

Let me repeat a question I asked Governor Olson and the distinguished attorneys general regarding the effect of S. 915 on *Hanover Shoe.*

Does S. 915 allow defendants in all section 4 units to assert pass-on to States, and are consumers able to assert an affirmative defense and, further, is it possible that a defendant could force the joinder of all 50 attorneys general as indispensable parties?

Mr. BOEDER. Senator Thurmond, I believe, as I understand the bill, S. 915 does indeed legislatively overrule *Hanover Shoe* in every instance where there is an indirect claim by a governmental plaintiff and to that extent it does overrule or affect *Hanover Shoe.*

To move on to your second point, yes, it would be possible in an instance where you had a manufacturer whose sales or whose product was marketed nationwide and sold to the citizens of all of the 50 States, it is possible you could end up in a situation with all of the 50 States' attorney general being joined.

One other embellishment upon that is that given the current efforts by State attorneys general to pass *Illinois Brick* repealer type legislation on the State level, there may very well come a point when defendants will want that result as opposed to the problem that might be encountered in the separate State jurisdictions.

The CHAIRMAN. Mr. Kohn, do you agree with the analysis Mr. Boeder just made?

Mr. KOHN. I think so.

That is one of the very strongest reasons why this bill should not pass. Take the *Hanover Shoe* case, it held that a person buying shoe manufacturing equipment could recover from the machinery manufacturers who conspired to raise the price of that machinery. It would get into a question if someone buys shoes for the prisoners in the State penitentiary, is the State the one that suffered the damage?

So you would never be able to prove what the actual damage was that was passed-on, and that is precisely the problem that you are going to have and precisely why *Hanover Shoe* and *Illinois Brick* should not be upset by either this legislation or any other legislation, however carefully drawn.

Mr. SHENEFIELD. With due respect, I agree that the problem of proving damages and allocating portions of damages at various levels of the distribution chain is not an easy one. But there are many aspects of our civil procedure which create difficult problems. It has never been thought to be an adequate reason for not trying to deal with unfairness, that it will create a problem.

Our ingenuity is sufficient, it seems to me, to deal with these problems, and our Federal Judges are generally quite able to cope.

Some slight additional complexity in a civil trial, where it involves dealing with plaintiffs who are not now able to get into court, seems to me to be a small price to pay.

The CHAIRMAN. Thank you.

There is a definite difference of opinion on this panel as to whether direct purchasers are ever inhibited from suing their suppliers. Mr. Shenefield and Mr. Boeder say they are inhibited. Mr. Kohn and Professor Cavanagh say they are not. Some of the large class action recoveries over the last few years seem to suggest that direct purchasers do sue.

What evidence can be produced to suggest that direct purchasers are reluctant to sue?

Mr. SHENEFIELD. My position would not be that they failed to sue in all cases. I can think of reasons why they would not sue. That has to do with the incentives built into the situation. Why would you sue if you have not lost any money because you have passed-on the overcharge to your own customers and the only thing you do by suing is to enrage a supplier who may be your only lifeline to supply in a time of shortage.

I can see why in a situation like that, it might not occur to a direct purchaser to sue. That same incentive would not apply to the indirect purchaser. Obviously, some direct purchasers sue and the question is whether more would or not if the law were changed.

Mr. BOEDER. If I may, Mr. Chairman, there are two observations that I could perhaps add in that regard. As was pointed out by Senator Gorton earlier in his testimony, it is a fact that in terms of antitrust filing, they are at the lowest ebb since 1970. In other words, the statistical evidence would tend to indicate that less antitrust cases are being brought than one might expect.

Obviously, there are a number of reasons for that. But I would submit that the *Illinois Brick* problem is a major contributor to that.

Going beyond that, since I have been in private practice, I have personally observed the reluctance of many businesses to even consider being plaintiff in an antitrust litigation for a variety of reasons. That is not to say that every business would refuse to sue its supplier, but there certainly is a reluctance there that I have perceived.

Mr. KOHN. May I speak?

I have already been unduly immodest but I think I have actually had the practical experience, if you will permit me to continue in the same vein for just another minute or two, probably more than anybody else in the room, with respect to representing these direct purchasers.

It is undoubtedly true that some of them are inhibited and do not want to bring suit.

On the other hand, with one or two exceptions, that I will talk to you about in a minute, in every instance where there was a reasonable cause of action and in every instance where the U.S. Government antitrust division brought action, there has been action maintained by these direct purchasers. There are a sufficient number of them that overcome the inhibition to bring the suit. Most of them have been class actions where recovery was obtained on behalf of the entire group, both the reluctant ones and the ones eager to go ahead. There were one or two instances, I think titanium was one, and the second electric turbine generator case, which was the other, where you did not have the wholesale infusion of suits by direct purchasers and where you did not have class suits.

But in those actions, those direct purchasers who were interested did assert their claims. I represented somebody in each case and those claims were satisfactorily adjusted, as a matter of fact, without even the necessity of bringing suit. But I know of no situation where there has been an absence of litigation because somebody was deterred because he was afraid. In those two cases, the titanium case and the turbine case, this bill could have accomplished no practical result, because the States by and large do not buy airplanes and the States by and large, while they buy electricity, I think by the remotest stretch of the imagination would not be permitted to recover because they bought electricity that was generated by a turbine generator that was overpriced.

The reason we do not have much antitrust litigation now, as Mr. Boeder said, and it is true, in the price fixing area, has nothing to do with this particular problem. *Illinois Brick* was there when Mr. Shenefield was in charge of the antitrust division and we had a great many price fixing suits brought. The problem is not the law. The problem is the man, Mr. Baxter, who has been in charge of the antitrust division for the past 2 or 3 years or more. After *Illinois Brick* there was no diminution in suits, because you had somebody dedicated to enforcing the antitrust laws, and that is your problem, not the law.

The CHAIRMAN. Mr. Cavanagh, do you want to comment?

Mr. CAVANAGH. With respect to statistical evidence of the impact of *Illinois Brick* on the antitrust enforcement, I am not aware of any studies, Senator, which would indicate that *Illinois Brick* had somehow—is causally related to the downturn in antitrust filings. I would underscore what Mr. Kohn said about the lack of enforcement by the antitrust division.

Beyond that, I think the *GTE/Sylvania* case, which changed the law with respect to vertical restrictions, from a per se rule to a rule of reason analysis, has had a tremendous impact on a number of filings.

And third, I think perhaps the problem we have had with the economy for the last couple of years has discouraged people from bringing suits.

Just to comment on a point Mr. Shenefield made. He suggests that a direct purchaser who passes-on an overcharge is not hurt. That is not necessarily so because the direct purchaser by raising his price may lose volume of sale. He can either absorb part of the overcharge and keep this volume constant, or can pass on his overcharge and lose in volume. So I think a direct purchaser, even though he passes-on 100 percent of his overcharge, may very well be injured by the fact of the decrease in volume.

Mr. BOEDER. Mr. Chairman, just one brief comment.

I mentioned in the testimony, when you were absent, that I am involved in work on a monograph for the American Bar Association and working with some others to study what has happened to the parens patriae legislation since the enactment, in other words, what have the attorneys general done. The results of that survey will be available hopefully soon but that resulted in a contact with all 50 of the attorneys general and they responded almost to a man or to an office that there were substantial numbers of cases they would have brought had it not been for *Illinois Brick*, and that the *Illinois Brick* situation is the principal roadblock between them and the bringing of *parens patriae* cases.

The CHAIRMAN. Thank you.

Mr. Shenefield, in your 1979 appearance before this committee to testify on S. 300, you suggested that nearly half of all antitrust enforcement might have been wiped out by *Illinois Brick.*

Do you feel that your analysis has proved to be correct and, if so, what evidence supports your conclusion?

Mr. SHENEFIELD. I do not have any evidence because I have not done any further analysis on that subject since that testimony. I think the appropriate measurement would be, if someone wanted to do it and I think it would be worth doing, what is the relationship between private suits and the Government's antitrust enforcement program; that is to say, taking a ratio before *Illinois Brick* of private suits to government prosecutions, what is that ratio today, and how have recoveries changed or not changed since *Illinois Brick*. I simply have not done the study and I do not have the information but it would be well worth doing.

The CHAIRMAN. Mr. Shenefield, you note in your written statement that any complexities created by S. 915 would not be different from those of other antitrust actions.

Could you tell us what other types of antitrust litigation complexities you feel are on a par with the use of both offensive and defensive pass-on?

Mr. SHENEFIELD. The antitrust laws are fabled for complexity. It did strike me as interesting that this committee is considering a contribution bill which will involve allocation of shares of responsibility among putatively culpable defendants and is willing to accept that degree of complexity in order to safeguard the interests of culpable defendants. It struck me as being ironic that it would not similarly commend itself to this committee to accept some complexity in order to award uncompensated and harmed plaintiffs that have been injured by antitrust violations.

But the whole damages field, as Mr. Kohn pointed out, is rife with complexity and indeed the law since story parchment is that once an antitrust violation is proved, it is not a requirement that you prove damages with great precision, and that order of magnitude is sufficient. It seems to me, adopting that general rule of reasonableness here, that courts will be able to allocate damages.

Mr. KOHN. In specific areas, the courts have held as a matter of judicial public policy that they were presenting certain persons whose claims are indirect from recovering. There have been cases where a lessor of a property, a motion picture theater, is adversely affected by a motion picture distributor's denial of product to the lessee. It has been held that this landlord who has a percentage lease, cannot sue. Similarly, employees of a company put out of business by an antitrust conspiracy have been held to have no legal right to sue, although, obviously, they are adversely affected by the conspiracy.

Those are two of many instances where the courts without quarrel from anybody who has practiced in them, have held that there must be a cutoff point that you cannot indefinitely continue to count the ripples which result from the stone being thrown into the pond, and these are two where the same underlying policy has prevented recovery.

Mr. SHENEFIELD. But it is a different policy.

The courts spoke of duplicative recovery and complexity in *Illinois Brick*. These plaintiffs are no more remote than other plaintiffs in antitrust cases. What has to be dealt with is how to get compensation to this level of plaintiff. Our present system simply does not do it.

The CHAIRMAN. As I understand this legislation, all indirect purchasers are precluded from collecting damages. Nevertheless, it would appear that they could become involuntarily involved in any lawsuit where either offensive or defensive pass-on is alleged because of the necessity of tracing damages through several distribution levels. If I am correct in my assumption, what effect would this have on complicating a lawsuit?

Mr. BOEDER. Mr. Chairman, the one comment I would have is that prior to *Illinois Brick* it was dealt with as any other complexity in an antitrust suit. My position is, it can be done now?

It is ironic that it was not the district courts that said they could not deal with these problems, it was the Supreme Court that said district courts should not be put to that burden.

Mr. CAVANAGH. Senator, if I might comment on that.

It seems to me involving third parties who are not parties to a suit and have no stake in the outcome for discovery for the pass-on issue is going to further complicate the litigation, make it much more expensive to prosecute the case and make it much more difficult for both the plaintiffs and the defendants to prove their claims.

My experience in dealing with nonparties is they are not exactly willing to cooperate and often make it very difficult for you to get hold of documents, to depose their employees, and so forth. But I think it will greatly complicate and make much more expensive the litigation.

The CHAIRMAN. Any other comments?

We would like to send you gentlemen some questions.

Would you be willing to respond to any questions? Some of the committee members may have some, too.

Another thing I would like to ask you, I believe you have expressed yourself for or against the bill.

Those who are against the bill, if we could ask you, in addition, to give us what modifications or changes you feel could be made, if a bill should be passed, if you would just give us your opinion on that point. In other words, if a majority of the committee see fit to pass some bill, what changes should be made in this bill if the committee should act that way?

Of course, if the committee is against any bill at all, that takes care of itself.

We thank all of you very much.

Senator HEFLIN. May I ask a few questions?

The CHAIRMAN. Excuse me, Judge Heflin. Senator Heflin from Alabama has some questions.

I have to open the Senate. He will take over until I get back.

Senator HEFLIN [presiding]. I did notice some aspects of it that seemed unusual to me. I see the issue of pass on is made a defensive matter rather than placing the burden on the plaintiff. I remember from some of the previous illustrations that some type of chemical went into the manufacture of nylon socks—they had 151 different steps at which there could have been absorption or pass on—and that the burden of proof in this bill is placed on the defendant.

I have not yet reviewed the new rules of Federal procedures, other than seeing the press reports. We will be studying it before the first of August when the new rules of Federal procedure go into effect, but basically the new rules provide that an attorney must sign any pleadings or any motion for discovery, in effect asserting that there is reasonable basis in law for the position he takes or the avenues that he intends to pursue, either in pleadings or in discovery.

Now this raises an issue, as I understand it. The new Federal rules of civil procedure do not really apply when the lawsuit is brought, but rather to the pleadings that follow, and before an attorney could, under the new rules of Federal procedure, get into discovery, he would have to, in effect, say that he has made a thorough search of the facts and the law and that he has a reasonable basis for his assertion. Instead of how this, under the new Federal rules of civil procedure, would affect attorneys, would affect burdens of proof and any of this sort.

Mr. BOEDER. Senator, if I may briefly, one observation I have in that regard is that a careful antitrust plaintiff's attorney, and I think that the State attorneys general and the U.S. Attorney General can be put in that category, would indeed make that sort of inquiry in any event, certainly before filing an antitrust action, that simply because the bill would create a situation where there would be the ability where a plaintiff, a State attorney general, would be allowed to go forward with an indirect purchaser claim, does not mean that the State's attorney general or the U.S. Attorney General in every instance would.

I would still envision there would be situations where, indeed, the complexity, just in terms of being able to in fact prove that the indirect purchasers damages were suffered, would be so great that the plaintiff, the attorney general, would not be able to make such a certification and would, in fact, not file a suit.

On the other hand, there certainly are others where it would be relatively simple, where, for example, in the *Petroleum* situation, where certain attorneys general at least alleged that a price fix by the oil companies had the intent and the effect of fixing the price at the pump, and where the briefing in that case established a theory whereby simply looking at price trends and economists could testify to that at a level of certainty that would be required to establish damages—my response, I think, to your question, at least as I perceive it, there may indeed, even if this bill were to be passed, the situation where a State attorney general or U.S. Attorney General, could not make such a certification but that would be a case that would not be filed in any event.

Senator **Heflin**. It has been a basic principle of Anglo-American jurisprudence that a plaintiff has to prove his case and we, over the years, have felt that that ought to be done under the rules of evidence and the quantum of proof from direct evidence. But as it appears to me, placing the burden of proof on every question, as on the question of pass on, provides an opportunity for extensive cross-examination rather than direct examination, which violates some of the fundamental principles of our jurisprudence. As to the requirement of proof of the major cause—whether or not there is price fixing—the circumstantial evidence is primary because seldom does anybody admit that they did it, I suppose. But with the burden of proof on the multiplicity of transactions which would involve pass on, there would simply be a question of whether or not it would be an unusual type of case in which, practically, proof can be obtained from cross-examination to make it a jury issue.

It seems from a theoretical basis with the defensive pass on and other defenses in your chain of events, if, for example, 51 chemicals go into the nylon socks, as people had charged a year or two ago, or if there were 10 different situations in regards to this, why should that burden of proof be placed on the defendants rather than on the plaintiff?

Mr. **Shenefield**. As I understand the situation, Senator, the defendants would like to have that opportunity. They do not now since the Supreme Court's decision in *Hanover Shoe*.

Senator **Heflin**. You can have one pass on.

Mr. **Shenefield**. But they cannot show anything about it. Their proof cannot——

Senator **Heflin**. It seems to me pass on involves indirect purchasers. You do not allow indirect purchasers. You have a direct purchaser that has the cause of action. So you do not have any real case law.

Mr. SHENEFIELD. As to that direct purchaser, you cannot prove that there has been a passing on. The defendant is required to remain mute on that point.

Senator HEFLIN. That is because the cause of action did not go to the direct. What you are saying is correct, but it does not have anything to do with the price of eggs.

Mr. SHENEFIELD. I do not know about that.

If your objection to the bill is that the plaintiff should have to prove the absence of passing-on, presumably in any multiparty situation anybody who may have liability, absent passing-on, ought to have the right to prove that some passing-on took place. As I understand this bill, that is what is attempted.

Senator HEFLIN. I never understood why if you are going to allow for indirect purchaser recovery, it is that you have to establish a super guardian for the rights of liability for the indirect purchaser?

Why the Attorney General?

Mr. SHENEFIELD. The alternative would be to allow the indirect purchaser to come in. Earlier bills made an attempt on that point but did not find favor with the Congress. This is a more modest approach.

Senator HEFLIN. Well, of course, we have heard dangers that it could turn into a situation of hiring attorneys and other things, and what if the Attorney General is running for Governor? I think they are running for U.S. Senate instead of Governorships. We have had quite a few in recent days that have gathered up here.

He must be the judge as to whether he brings a suit or he does not bring a suit. The rationale of why, if you are going toward indirect—the issue is whether or not you ought to, and there are a lot of arguments. This clearly brings out the point of pass-on and the Court and jury have to be able to determine the transactions that are involved and the timeframe and the other things, some of the other arguments. I believe that one of the Justices in the *Illinois Brick* case or *Hanover Shoe* mentioned that as one of the dangers. I just wonder if there a logical, legal reason that the Attorney General, maybe it is a political reason, but is there a rationale that the Attorney General, ought to be the one to do it?

Mr. BOEDER. I think there is Senator.

First of all, it is useful to divide the bill into the two categories of suits that a State attorney general can bring. The first is a suit on behalf of the State itself, and its political subdivisions, and the second is the parens patriae suit on behalf of the citizens.

As to the first type of suit, the State attorney general is the logical plaintiff because the State attorney general tends to represent those people, the political subdivisions in many respects, and has historically most frequently represented them in antitrust litigation and as a matter of fact, in some States by State law the State attorney general represents those people.

With regards to the parens patriae aspect of it, of course that goes back to the Hart-Scott-Rodino Act, and the parens patriae portion of that piece of legislation that the Congress passed, and there the thought was that the State attorney general, because the State attorney general is the traditional representative of the citizenry in those instances where they as a practical matter cannot protect themselves, that the State attorney general is the logical individual to bring these consumer-type cases because you or I acting as individuals are not going to sue six of the largest corporations in the country in order to recover a $2 overcharge on an item we bought. It would not be feasible to do it. It was the Congress intention to designate the Attorney General to do that.

Senator **Heflin**. That is a form of subsidization for the plaintiff.

Mr. **Boeder**. In effect, that is correct.

And so as the Attorney General, in effect, inherits that action, and then, of course, there are certain things in the bill which describe what the Attorney General can do with that money if he wins and one of the things is a distribution to the citizens, a mailing sort of thing, but another thing is it can be put into the State coffers, it can be put to specific purposes that benefit the public generally.

So there is a rationale for the State attorney general being involved and having a preferred position, as it were, in antitrust enforcement, and there is a logical distinction as between an attorney general and just any indirect purchaser plaintiff.

Senator **Heflin**. Thank you.

[Prepared statements follow:]

STATEMENT

OF

JOHN H. SHENEFIELD

Mr. Chairman and Members of the Committee:

It is a pleasure to appear before you to discuss S. 915, the "Taxpayer Antitrust Enforcement Act of 1983." The bill would create a limited exception to the Supreme Court's holding in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), that only direct purchasers from antitrust violators may obtain monetary relief under the Clayton Act for overcharges resulting from violations of the antitrust laws.

Almost six years have now passed since I first testified in favor of legislation to address the negative effects of Illinois Brick. Since then, both Houses of Congress have engaged in exhaustive hearings and debate on this subject. Thus, it should hardly be necessary to repeat here the familiar litany of problems that Illinois Brick has created. I will refer only to the eloquent and succinct statement of the need for legislation that Professor Phillip Areeda of the Harvard Law School formulated in 1977:

> Illinois Brick and Hanover Shoe create the unsatisfactory result of (A) denying any recovery to many truly injured persons, while (B) granting the exclusive right to sue to the middlemen who, in many cases, will either (i) sue and obtain windfall gains or (ii) not sue and thereby allow some defendants to retain the evil fruits of their antitrust violations.

Effective Enforcement of the Antitrust Laws, Hearings on H.R. 8359, Before the Subcomm. on Monopolies and Commercial Law, of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 74 (1977).

I submit, Mr. Chairman, that the time has arrived to take concrete action to redress at least some of the adverse effects of Illinois Brick, even if the resulting legislation is less than perfect from any single party's point of view.

S. 915 represents, in my judgment, a carefully balanced, narrowly targeted, and eminently reasonable approach to breaking the legislative logjam that has undermined the public interest in vigorous litigation of antitrust cases since the decision in Illinois Brick was handed down. To be candid, this bill goes a far shorter distance toward overturning Illinois Brick completely than I personally have favored. But I support this bill as a modest compromise that should enjoy the endorsement of all groups who share a genuine interest in effective antitrust enforcement.

S. 915 would permit suits by injured indirect purchasers against antitrust violators in three narrowly limited circumstances:

First, the Attorney General of the United States could bring suit to obtain monetary damages caused to the United States by antitrust violations even where the United States was an indirect purchaser of the goods in question.

Second, state attorneys general could bring suits to obtain damages whenever a state, or a political subdivision of that state, was injured by a violation of §1 of the Sherman Act, regardless of whether the state or political subdivision was a direct purchaser from the antitrust violator.

Third, state attorneys general could bring parens patriae suits for damages under §§1-7 of the Sherman Act, even where the consumers they represent may have been indirect purchasers of the goods at issue. This aspect of S. 915 would vindicate Congress' intent in enacting only a few short years ago the Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976), to allow parens patriae suits under the antitrust laws by state attorneys general -- an intent that the Illinois Brick decision has frustrated.

In short, the legislation creates an extremely limited class of plaintiffs who would be permitted to sue on an indirect purchase theory. To be precise, there would only be 53 such plaintiffs: the U.S. Attorney General, the attorneys general of the 50 states, and the attorneys general or their equivalent in the District of Columbia and Puerto Rico. Of course, only the latter 52 officials would have any authority to bring parens patriae suits on behalf of consumers.

Because it creates such a minuscule class of potential plaintiffs, S. 915 gives Congress a way out of the fundamental dilemma that led the Supreme Court to the result it reached in Illinois Brick. As the members of this Committee know well, the Court concluded that allowing suits by indirect purchasers against antitrust violators would subject those violators to a danger of multiple liability, unless courts were permitted to adjudicate the complex issue of whether overcharges had been passed on to indirect purchasers by direct purchasers. But the Court had earlier decided in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) that, to avoid overburdening the courts with treble-damage actions that were unduly complicated, and to avoid allowing antitrust violators to "retain the fruits of their illegality" where indirect purchases had only a small stake in potential antitrust litigation, proof of passing-on as a defense would be precluded. Illinois Brick applied that preclusion to "offensive" use of passing-on by plaintiffs who are indirect purchasers.

Because the class of potential plaintiffs created by S. 915 is so small, however, the marginal burden that would be cast upon the judicial system by allowing proof of passing-on in the limited class of suits it authorizes is likely to be small. The legislation will not have major significance for the overall functioning of the judicial system because its scope is carefully restricted. While it is true that S. 915 may cause some individual cases to become somewhat more complex undertakings, these complexities will not be different in kind from difficulties that the courts face daily in many contexts, and indeed, in the context of other antitrust actions. Certainly these problems will be no more difficult than those that will be presented if legislation of the kind now being considered by this Committee allowing contribution among antitrust violators becomes law. If complexity is justified when it avoids unfairness to putatively culpable antitrust defendants, surely it is at least as tolerable when it assists in compensating injured antitrust plaintiffs. As Justice Brennan stated in his dissent in Illinois Brick, "[r]easoned estimation is required in all antitrust cases, but 'while the damages [in such cases] may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result may be only approximate.'" Illinois Brick, 431 U.S. at 759, (quoting Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931)).

Whatever small price is paid in terms of the additional complexity of those few cases litigated will be, in my judgment, more than outweighed by the benefits to be gained by making a limited number of actions by indirect purchasers possible. These benefits include redressing the injuries actually suffered by indirect purchasers, which will otherwise go unremedied; avoiding windfalls to direct purchasers who have actually been compensated through the mechanisms of the marketplace (that is, by passing overcharges along to their customers); and creating a realistic possibility that antitrust suits will be filed in circumstances where direct purchasers lack an incentive to sue because of passing-on, or because they fear earning the enmity of important suppliers.

When the federal or state governments have been injured in their proprietary capacities, it is especially difficult to fathom any reason for denying those governments a right to recover taxpayers' dollars that have been wrongfully taken from the public treasury by virtue of antitrust violations. Parens patriae suits brought by state attorneys general, on the other hand, are an effective device for redressing injury to consumers, whose individual stakes in particular violations may give them little incentive to bring suits individually. I am certain from my own experience as an antitrust prosecutor for the federal government that state attorneys general will be judicious in choosing the cases that they bring to court, both because they value their reputations as serious and responsible law enforcement officials and because the limited staff and budgetary resources at their command will require them to make hard choices among competing priorities for use of their litigation budgets.

In short, whether or not the fear that overturning Illinois Brick would open floodgates of litigation was justified in the context of the comprehensive Illinois Brick legislation that has been proposed in the past, it certainly has no basis in fact with regard to the present bill. As we all know, even in the most vigorous administrations, Justice Department actions account for only a small percentage of antitrust litigation; private litigation is and must always be the primary mechanism of antitrust enforcement. If Congress takes seriously the goal of encouraging enforcement of the antitrust laws by parties other than the Department of Justice, I find it difficult to perceive how it can fail to enact, at a bare minimum, legislation along the lines of S. 915 as promptly as possible.

PREPARED STATEMENT
OF
HAROLD E. KOHN
IN OPPOSITION TO SENATE BILL 915

As I have pointed out to the Committee and to the House at hearings on similar Bills over the last several years, the decision of the United States Supreme Court in the Illinois Brick case has materially advanced the enforcement of damage actions in antitrust cases, and particularly in price fixing cases, and has not impeded such enforcement.

As typical of that testimony, see Testimony of H. E. Kohn at hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, Ninety-Fifth Congress, First Session on S.300, March 14, 1979, pages 232-237; Testimony of H. E. Kohn at hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, Ninety-Fifth Congress, First Session on S.1874, July 21, 1977, pages 44-53, 269-271; Testimony of H. E. Kohn at hearings before the Subcommittee on Monopolies and Commercial Law of the Committee of the Judiciary, House of Representatives, Ninety-Sixth Congress, First Session on H.R. 2060 and H.R. 2204, April 10, 1979, pages 258-282.

The transcripts just referred to also summarize my own experience in such matters.

Briefly summarized, the reasons for my opinion are:

1. The Illinois Brick decision eliminates or substantially reduces the ability of defendants to obfuscate the damage issue by claiming that the first purchaser passed on the damage, and at the same time claiming that the indirect purchaser did not suffer the damage. This esoteric economic inquiry gave defendants the opportunity to play one group of plaintiffs off against another almost indefinitely. Each group of plaintiffs had the burden of proving damage to themselves, so that an evenly balanced

record could result in the exoneration of defendants from all claims of all plaintiffs.

2. Practical experience has shown that recoveries from defendants since Illinois Brick have not substantially decreased in number or amount. Indeed, some of the larger recoveries, by way of both trial judgments and settlements, have been achieved since that decision. For example, consider these:

Corrugated Boxes Antitrust Litigation	$380 Million, plus interest
Folding Carton Antitrust Litigation	$200 Million, plus interest
Plywood Antitrust Litigation	$173 Million, plus interest
Fine Paper Antitrust Litigation	$50 Million, plus interest
Water Heater Antitrust Litigation	$27 Million, plus interest

There have been at least a score of other such recoveries ranging from $1 million to $25 million.

3. It is respectfully submitted that the Congress should declare a moratorium on amendments to the antitrust laws for the remainder of this Congress. It has been bombarded with proposals to establish contribution, to reduce claims, to eliminate treble damages, and otherwise to impede the effective enforcement of competition. No such amendment is necessary, none is in the public interest, and none should be enacted, including S.915. The only serious problem at the present time with the effective enforcement of the antitrust laws is the Honorable William F. Baxter, who is misdirecting his energy as head of the Antitrust Division of the Justice Department to nullify effective antitrust enforcement against many types of violation.

Respectfully submitted,

STATEMENT OF EDWARD D. CAVANAGH, ASSISTANT DEAN AND ASSOCIATE PROFESSOR OF LAW, ST. JOHN'S UNIVERSITY SCHOOL OF LAW BEFORE THE SENATE COMMITTEE ON THE JUDICIARY, JUNE 8, 1983

I appreciate the opportunity to be heard on the proposed legislation, S. 915, which is designed to overrule in part the Supreme Court decisions in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) and Hanover Shoe Corp. v. United Shoe Machinery Corp., 392 U.S. 481 (1968). Since tomorrow marks the sixth anniversary of the Illinois Brick decision, it is only fitting that we discuss that ruling today.

Since January 1982, I have been Assistant Dean and Associate Professor of Law at St. John's University School of Law in New York City. For nearly eight years prior to that, I was engaged in the private practice of law. During four of those years I was associated with the firm of Donovan Leisure Newton & Irvine in New York City, concentrating in antitrust litigation. I spent the bulk of my time there on two antitrust matters, In re Antibiotics Antitrust Actions ("the tetracycline case") and In re Uranium Antitrust Litigation; and thus I am no stranger to complex antitrust litigation. I have also written in the antitrust field. While I am a member of a number of professional organizations, the views which I express here today are my own and do not necessarily reflect the positions of any professional group to which I belong nor the institution with which I am affiliated.

The pending legislation is fraught with practical pitfalls which would create insurmountable hurdles to fair and effective management of antitrust cases, thereby frustrating the twin aims of treble damage litigation -- deterrence and compensation.

Indirect purchaser claims are inherently complex, raise novel and difficult problems of proof, present serious risks of multiple liability and place staggering burdens on the courts and the litigants. The enormous procedural and practical problems engendered by the complex issues which are inherent in major antitrust treble damage litigation are best handled by the courts which are in a better position to determine which claims are meritorious and which are brought primarily for the benefit of attorneys. Legislative intrusion into the passing-on domain may have a result quite opposite from that intended by Congress by creating a procedural quagmire of competing and speculative damage claims which, in the end, will make it even more difficult for all plaintiffs to be compensated for antitrust violations in the future.

I. ILLINOIS BRICK WAS PROPERLY DECIDED AND OUGHT NOT TO BE OVERRULED BY CONGRESS.

The issue in Illinois Brick was, as between two groups of purchasers at different levels in the same vertical chain of distribution - those purchasing directly from defendants and the customers of such purchasers - which group had a claim for overcharges in a treble damages action, arising out of an alleged price-fixing conspiracy at the manufacturer's level. Reaffirming its prior holding in Hanover Shoe, the Supreme Court held that the overcharged direct purchaser, and not indirect purchasers down the distribution line, is the party injured in his business or property under § 4 of the Clayton Act and should be deemed to have suffered the full injury caused by any illegal overcharge. Thus, Illinois Brick precludes indirect purchasers who claim to have had illegal overcharges passed on to them and thus to have borne the brunt of such overcharges from recovery in treble damage actions.

Illinois Brick has not been a popular decision in many quarters. Although we can probably all agree that the antitrust laws ought to be enforced so as to maximize the twin goals of compensation and deterrence, there is considerable disagreement as to how these goals might best be accomplished in the real world. As a general proposition, I find it difficult to quarrel with the contention that persons who may have been injured by antitrust violations are entitled to their day in court. Nevertheless, I am not convinced that we can compensate all indirect purchasers who may have absorbed part of an overcharge without seriously imperiling the deterrent value of the treble damage remedy. Where the administrative and social costs of enforcing indirect purchasers' claims in terms of (1) lengthier and more expensive pretrial and trial proceedings; (2) more complicated proof; (3) unwieldy trials; (4) clogged dockets and (5) diversion of benefits from victims to lawyers, outweigh the benefits derived therefrom, the aims of antitrust enforcement, especially in terms of deterrence, are not furthered but rather hindered.

While Illinois Brick is perhaps not a perfect solution to the problems posed by indirect purchaser suits, it does confront face to face the very practical problems which arise in the litigation and management of complex antitrust suits. The decision strikes a fair balance between the often competing goals of compensation and deterrence, and its accommodation of these competing interests will ultimately promote antitrust enforcement.

Thus, Illinois Brick cannot be fairly viewed as an anti-consumer decision. The decision itself does not bar consumers from suing for treble damages; consumers may recover under Illinois Brick if they can prove that they purchased directly from the defendants. The right of consumers to recover in antitrust treble damages was upheld by the Supreme Court in Reiter v. Sonotone Corp., 442 U.S. 330 (1979). What Illinois Brick has done is to bring some semblance of order to the chaos which had prevailed in indirect purchaser actions.

It seems to me that the proponents of the current bill and its predecessors dating back to 1977 brush aside the practical problems which inevitably arise in complicated antitrust litigation, suggesting that they are more imaginary than real. In my view, the practical problems identified by the majority in Illinois Brick are very real and in no way overstated. The problems include: (1) difficulties in tracing alleged overcharges from point to point through the chain of distribution, especially in recreating the price/output decisions of thousands, if not hundreds of thousands, of non-party intermediaries and allocating injury between direct and indirect purchasers; (2) the added dimension of complexity which passing-on will bring to already complicated lawsuits which threatens to render antitrust cases wholly unmanageable; (3) the risks of multiple liability and inconsistent judgments which arise by sanctioning suits by indirect purchaser suits; and (4) reduction in the effectiveness of the treble damages remedy which would result from the combination of increasing costs and diffusing benefits, were indirect purchasers, with a relatively small stake in the outcome, permitted to sue.

Unfortunately, the pending bill fails effectively to address or to resolve the manageability problems inherent in indirect purchaser actions as described in Illinois Brick. The legislation simply singles out a class of cases -- parens patriae cases pursuant to 15 U.S.C. § 15c -- in which offensive and defensive use of passing-on will be permitted. However, there is nothing about the parens patriae cases as a class which logically differentiates them from the run of the mill indirect purchaser cases. Indeed, the bill presents precisely the kinds of enormous practical problems -- manageability, tracing, complexity, and skyrocketing costs -- which hinder rather than promote enforcement of the antitrust laws.

II. PERMITTING PROOF OF PASSING-ON WOULD CREATE INSURMOUNTABLE PROBLEMS OF MANAGEABILITY AND IMPOSE ENORMOUS COSTS ON THE JUDICIAL SYSTEM AS WELL AS THE LITIGANTS

A. Tracing Overcharges

A major practical problem created by allowing proof of passing-on is tracing the overcharge from the alleged antitrust violator through the various intermediaries in the chain of distribution to the plaintiff-indirect purchaser. Tracing involves two interrelated exercises: (a) flagging the alleged overcharge from transaction to transaction in the verticle distribution chain; and (b) establishing a causal nexus between an overcharge so identified and the defendants' purported illegal conduct. I do not believe that either of these tasks can be accomplished in the courtroom without resort to outright guesswork.

In the usual price-fixing cases involving plaintiffs who are direct purchasers, the measure of damages is the difference between the price actually paid by the plaintiff and the price that would have been paid but for the claimed overcharge. Determining the "but for" price is frequently complicated under present law but would be made even more complicated were S. 915 enacted.

Indirect purchasers' claims would be measured by the difference between what indirect purchasers actually paid for the particular goods and what the price of the wholesaler, retailer, jobber or other middlemen would have been but for the manufacturer's illegal overcharge. The key issue in indirect purchaser claims is not whether intermediaries generally pass-on increments or decrements in their acquisition costs, but rather the extent they would have done so in particular transactions had their acquisition costs not been inflated by illegal overcharges. Resolution of the passing-on issue thus requires the court to re-create the price/output decisions of non-conspiring resellers, including whether each reseller would have realized more on its resale had one element of cost been lower, whether such reseller would have kept its resale price the same, had its costs been less; and whether such reseller would have lowered its price in the amount of the reduced acquisition costs.

Tracing may seem like a fairly easy exercise when looking at a "laboratory model" consisting of a conspiracy at the manufacturer's level with several manufacturers selling to retailers who in turn sell to the consumer. However, the exercise becomes mind boggling when one attempts to trace overcharges in the real economic world involving numerous levels in the distribution chain, consisting of hundreds of wholesalers, thousands of retailers and millions of consumers. Moreover, the price/output decisions of intermediaries at each point in the distribution chain must be examined to measure accurately the precise amount passed on. Thus, adjudication of the passing-on claims would force the court to examine individual relationships between intermediaries and defendants thereby splintering the action into thousands of individual trials requiring years to litigate. Such a litigation is clearly unmanageable.

Philadelphia Housing Authority v. American Radiator & Standard Corp., 50 F.R.D. 13 (E.D. Pa. 1970), aff'd sub nom., Mangano v. American Radiator & Standard Corp., 438 F.2d 1187 (3d Cir. 1971), presents an ideal example of the difficulties of relating an alleged passed-on overcharge to defendants' illegal conduct. Defendants therein were manufacturers of plumbing fixtures who sold to plumbing contractors which incorporated fixtures into homes sold by building contractors to new home purchasers, who, in turn, sold homes to used home buyers. The overcharge on fixtures amounted to roughly $10 per unit and were incorporated into homes selling in the $20,000-$30,000 range.

The court found untenable the plaintiffs' contention that a builder selling a $30,000 house would have priced the house at $29,990 but for a $10 overcharge imposed by the plumbing fixtures manufacturers. The court further rejected plaintiffs' implicit contention that the price for homes is affected by relatively miniscule changes in the prices of plumbing fixtures, rather than by the demand in the market for homes as a whole. Put another way, connection between the initial overcharge and prices paid by remote purchasers in successive independent markets was so attenuated as to raise the insuperable problems of proof.

A more recent example of the practical problems in proving tracing is presented in In re Beef Industry Antitrust Litigation, 542 F. Supp. 1122 (N.D. Tex. 1982). Attachment A hereto, a chart prepared by the court to outline the chain of distribution, starkly illustrates the utter impossibility of tracing overcharges from manufacturer to consumer.

B. Complexity

The judicial system is simply not equipped to handle the massive evidence which would become part of every antitrust treble damages action were proof of passing-on permitted.

Introduction into evidence of what the price/output decisions of manufacturers and middlemen at various points in the distribution chain would have been but for the overcharge, furnished primarily by expert economists, threatens to transform the court room into a three-ring circus. In the case of a nationwide conspiracy, the fact-finder will be subjected to testimonial and documentary evidence regarding the individual pricing decisions of hundreds of wholesalers and perhaps thousands of retailers on millions of transactions. Trials would become interminable and pretrial discovery would become lengthier, costlier and more detailed. I do not think that the federal courts can embark on such massive undertakings without either running roughshod over the rights of the parties or forcing our already overtaxed judicial system to collapse.

The task of sorting out the rights of direct and indirect purchasers would be a formidable one for a trial judge well-schooled in esoteric antitrust damage principles, but it may well prove an insurmountable task for a jury. The Committee should not assume that plaintiffs or defendants will waive their Constitutional right to a jury trial in _parens patriae_ cases. The bill makes no proposal as to how the claims of all parties can be fairly and effectively adjudicated in the context of a jury trial without risking sacrifice of each party's due process rights.

For a preview of the complexity which likely would be entailed in every action under S. 915, one need only look to the _Petroleum Products Litigation_ now pending in the Central District of California. That case involves a _parens patriae_ action against the major oil companies for price fixing by the attorneys general of five states. Since most consumers purchased gasoline from retail dealers, rather than defendants, most claims were barred by _Illinois Brick_. In denying the plaintiffs' motion for class certification, the court noted that adjudication of the passing-on would require it to examine individual relationships between defendants and intermediaries resulting in a splintering of the claims in thousands of individual trials requiring many years to adjudicate; that task would be completely impractical. In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 523 F. Supp. 1116, 1119 (C.D. Cal. 1982). The task would be equally impractical in actions which would typically arise under the proposed bill.

C. Double Recovery And Inconsistent Judgments

While the drafters of the proposed bill appear to have recognized the potential problems of double recovery and inconsistent judgments which may arise by permitting offensive use of passing-on, the solution contained in S. 915 is inadequate. This bill would make the Attorney General of the United States or Attorney General of the various states necessary parties whenever defendants wish to interpose the passing-on defense in actions by direct purchasers. Quite apart from the practical problems that would be raised by attempting to adjudicate the competing claims of direct and indirect purchasers in one suit, the proposed legislation may not prevent double recoveries and inconsistent judgments in situations where suits are initiated by Attorneys General prior to the commencement of any action by direct purchasers. Thus, it is conceivable under this bill that parens patriae suits may be litigated to judgment before a direct purchaser brings suit. That direct purchaser would insist that it had a right to prove its own case before a jury based on evidence developed in that case and not be bound or limited by the results of other cases to which it was not a party. Collateral estoppel would not apply from the jury's determination in the first case as against the plaintiffs in the subsequent actions. For collateral estoppel to apply, the person estopped in a subsequent action must have had a full and fair opportunity to litigate the issue in the prior action. Allen v. McCurry, 449 U.S. 90 (1980). It may be that the findings on the issues of liability or passing-on will be at odds in the various proceedings.

That these risks are real and not imagined is aptly illustrated by the Petroleum Products case. Denying class certification to parens patriae plaintiffs, the court noted that a parallel proceeding by direct purchasers was proceeding in another forum seeking to recover the same dollars sought by the parens patriae plaintiffs (542 F. Supp. at 1120-1121). The only way to avoid such potential double recoveries and inconsistent results is a consolidated trial in which all parties present their cases before the same factfinder, so that all potential claimants are bound by the factual determinations on the passing-on issues. Any such massive undertaking, however, would be wholly inconsistent with the requirements of a fair trial.

D. The Tetracycline Case

In my view, this Committee ought not to assume that the practical problems of manageability, complexity, double recovery and inconsistent judgments can be overcome by merely looking to the Federal Rules of Civil Procedure, provisions in the Judiciary Code or the ingenuity of the courts and counsel. My experience on the tetracycline case convinces me that they cannot.

Originally, the tetracycline case involved some 166 cases, many of which were class actions, brought against five drug manufacturers by direct and indirect purchasers alike. Plaintiffs included retail pharmacies; drug wholesalers; city, county and state hospitals; private hospitals; states on behalf of themselves and consumers; insurance companies; union welfare funds; Blue Cross and similar entities; the federal government, both as a purchaser of drugs and a reimburser under various federal programs; competitors of defendants; foreign governments; dispensing physicians; and individual consumers. In addition, there were a series of claims brought by various agricultural users of tetracycline. A number of cases settled, but in the fall of 1974, six cases were consolidated for trial before Judge Miles Lord in the District of Minnesota: the

United States claim, an insurance company class action, a union trust fund class action, a hospital benefit entity action and two competitor claims. After seven months of trial over a period of eighteen months before two juries in which 136 volumes of trial testimony had accumulated, the court declared a mistrial, finding that it would be impossible for the "irritated, bored and confused" jurors to reach a fair verdict based on the evidence. In re Antibiotics Antitrust Actions, 1976-2 Trade Cas. (CCH) par. 61,058 (D. Minn. 1976) at p. 69,779. At the time of the mistrial, plaintiffs were just beginning to reach the heart of the liability claims; the damage issues had not even been touched. Given the fact that large amounts of proof were relevant to some cases but not others and given the complexity of the issues, not to mention the length of the trial, the court had no choice but to declare a mistrial. Far from showing that the judicial system is capable of handling complex antitrust suits, the tetracycline case amply demonstrates how ill-equipped the courts are to handle massive claims by direct purchasers and indirect purchasers at every conceivable point in the chain of distribution.

In connection with the tetracycline case, I wish to make an observation or two. First, while the defendants in that action paid in excess of $250 million in settlement, there has never been a final judgment finding that the defendants engaged in the conspiracy which had been charged. Indeed, in the several cases actually tried, including separate criminal and civil actions by the United States and a class action suit brought by the State of North Carolina, defendants prevailed. Thus, the mere fact that an antitrust conspiracy is alleged does not mean that such a conspiracy will be proven. Congress ought not pass legislation that would increase the costs and risks of antitrust defense so as to compel settlements.

Secondly, all litigation is uncertain, and that uncertainty is magnified as the factual issues become more complex. Faced with potentially enormous liability in treble damage actions, defendants, as prudent businessmen, may have little choice but to settle, even where the chance of recovery may appear slight. Illinois Brick had the virtue of providing the parties a modicum of certainty to the process of analyzing and weighing risks of litigation. The proposed bill will remove the element of certainty Illinois Brick provided and make the task of assessing potential exposure far more difficult.

E. Impact On Pretrial Disposition Of Claims

Under Illinois Brick, it was possible to dispose of all indirect purchaser claims by summary judgment motions prior to trial. Summary judgment is a very useful weapon in the court's arsenal to dispose of frivolous or remote claims and generally to cut a complex case down to size. By overruling Illinois Brick, Congress will rob the courts of this important tool in managing complex litigation. Because of the myriad of factual questions which are raised when passing-on is in issue, pretrial disposition of indirect purchaser claims will become impossible under the proposed bill.

III. THE ANTITRUST LAWS WILL BE MOST EFFECTIVELY ENFORCED IF FULL RECOVERY IS LODGED IN THE HANDS OF FIRST PURCHASERS

A. Direct Purchasers Are In The Best Position To Sue

I think Hanover Shoe was correct in holding that the first purchaser is the person injured within its business or property within the meaning of § 4 of the Clayton Act. A direct purchaser is in the best position to detect a violation. Since the direct purchaser deals directly with the alleged violator and presumably the violator's competitors, it is in a better position than remote purchasers to determine whether price increments are due to conspiracy or due to a legitimate cause. Moreover, since direct purchasers, unlike indirect purchasers, are not saddled with the burden of proving passing-on, the direct purchaser incurs far less costs in proving its claims. In my view, it would be disastrous for antitrust enforcement and particularly for plaintiffs to overrule Hanover Shoe by permitting the passing-on defense. The passing-on defense will most likely be raised in every case. Direct and indirect purchasers will be forced to waste their typically limited resources in competing with one another to prove how much of an overcharge was or was not passed-on, instead of focusing on defendants' violation of the antitrust laws. Given the uncertainty of the amount of any recovery because of the passing-on defense, even in the face of clear liability, direct purchasers will be discouraged from suing. Defendants will have greater incentive to engage in delay tactics and will vastly expand the scope of discovery. In short, re-introduction of the passing-on defense will make it much more difficult for plaintiffs to recover in treble damages actions and thereby hinder enforcement of the antitrust laws.

B. Direct Purchasers Do In Fact Sue

Direct purchasers have traditionally been the very active enforcers of the antitrust laws. I disagree with those who suggest that Illinois Brick has chilled the vigor of private antitrust enforcement and that direct purchasers are reluctant to sue violators for fear of disrupting business relationships. I know of no empirical studies which support these contentions. I am aware from my view of the statistics published by the Office of Court Administration that the number of treble damages suits has declined in the last several years. However, for this Committee to assume that Illinois Brick is the principal factor or even a significant causal factor in this decline is a dangerous exercise in post hoc ergo propter hoc reasoning.

In my view, the decline in antitrust enforcement can be laid principally to two factors: the striking lack of enforcement activity -- outside the road-building area -- by the

Antitrust Division and the general economic downturn we have experienced in recent years. The private antitrust bar has traditionally looked to the government for leadership in antitrust enforcement; where the government actively prosecutes cases, private plaintiffs typically follow suit. The lack of leadership in antitrust enforcement emanating from Washington has left a void which the private bar has not filled.

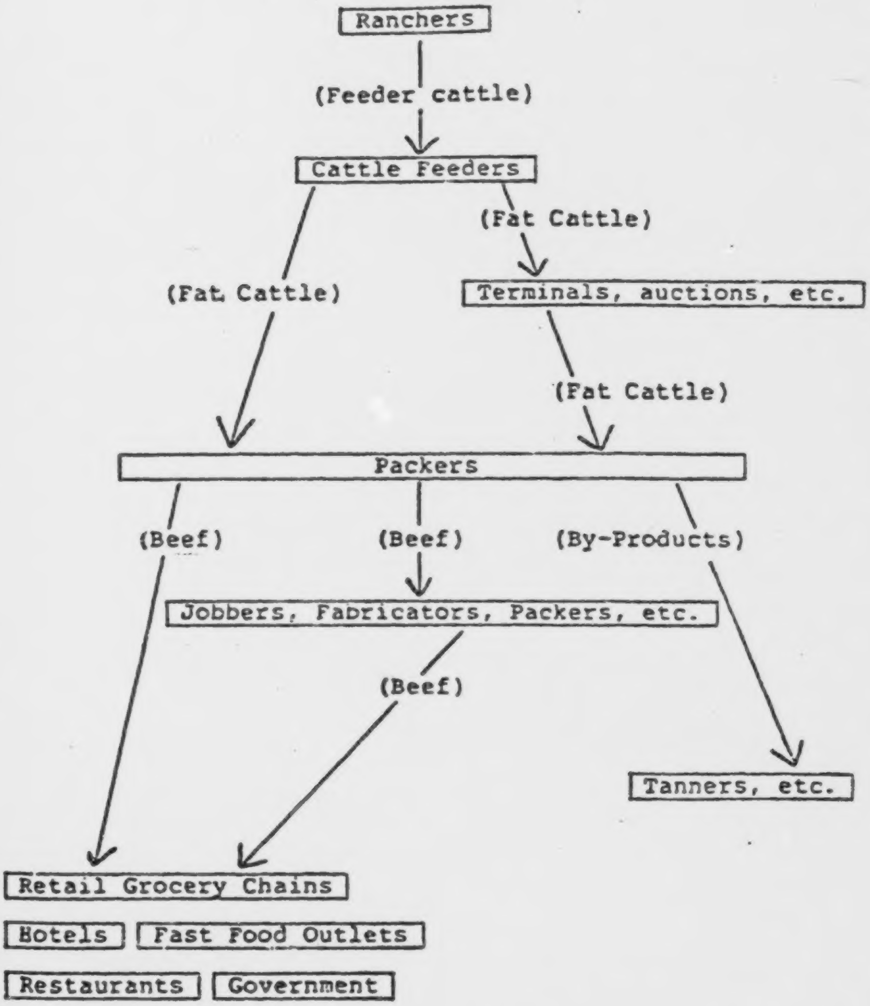
Moreover, a review of the reported cases demonstrates that direct purchasers are not reluctant to sue. I refer the Committee to two recent large class action litigations, including _In re Fine Paper Antitrust Litigation_ and _In re Corrugated Container Antitrust Litigation_, each of which principally involved direct purchasers. Each of these matters have produced multi-million dollar settlements. The value of the _Corrugated_ settlement alone, including interest, exceeded $550 million. 556 F. Supp. 1117, 1141 (S.D. Tex. 1982). The _Fine Paper_ settlement exceeded $50 million. 44 Antitrust & Trade Reg. Rep. (BNA) 538. Thus, direct purchasers are enforcing the antitrust laws, and large amounts of money are being paid by defendants to plaintiffs to dispose of antitrust suits even in the face of a quantitative decline in the number of antitrust suits. Consequently, it cannot be fairly maintained that after _Illinois Brick_, direct purchasers are unwilling to bring suit.

IV. RE-INTRODUCTION OF THE PASSING-ON ISSUE INTO ANTITRUST LITIGATION WILL IMPOSE UNACCEPTABLE SOCIAL AND ECONOMIC BURDEN ON THE LITIGANTS, THE COURTS AND THE PUBLIC

Wholly apart from the problems of manageability discussed above, the passing-on issue will impose undue burdens on the litigation process. Since the questions of passing-on and actual injury must be litigated, pretrial proceedings will be lengthier, thereby not only increasing the litigation costs but also delaying the ultimate resolution of the case. Many complex antitrust cases which now move through the system at a snail's pace will move even slower, further clogging already congested dockets. At a minimum, tens of thousands of man-hours will be spent examining whether, and the extent to which, individual retailers absorbed or passed-on alleged overcharges to consumers. The social costs of focusing on such minutiae is unacceptably high.

I think the Committee should note that, realistically, S. 915 involves suits that will be brought as class actions. Yet, since 1966, when Fed. R. Civ. P. 23 was adopted, not one consumer class action has proceeded to a litigated judgment on the issues of both liability and damages. Such cases are generally settled. Thus, the proposed bill seeks to accomplish what has never been done in the federal system. I seriously doubt whether class actions which include both direct purchasers and ultimate purchasers can be tried in the same forum without sacrificing the due process rights of all parties. In the final analysis, the burdens imposed on the judicial system by the proposed legislation will far outweigh any benefits to be derived therefrom.

Attachment "A"


Ranchers
(Feeder cattle)
Cattle Feeders
(Fat Cattle)
(Fat Cattle)
Terminals, auctions, etc.
(Fat Cattle)
Packers
(Beef)
(Beef)
(By-Products)
Jobbers, Fabricators, Packers, etc.
(Beef)
Tanners, etc.
Retail Grocery Chains
Hotels
Fast Food Outlets
Restaurants
Government

[1] That the feeders do not sell directly to the retailers poses a high hurdle to their suit against these "indirect" purchasers, a hurdle constructed by *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1976). The issue now before this court is whether the feeders can successfully tread the narrow path around this hurdle.

In *Hanover Shoe*, the Supreme Court decided that an antitrust defendant in a suit by a direct purchaser cannot assert a "pass-on" defense, claiming that the direct purchaser passed on any injury from illegal overcharges to its customer, the indirect purchaser.[4] Concerned that the practical

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[4] In *Hanover*, the plaintiff, a shoe manufacturer that leased shoe machinery from defendant United, alleged that United had monopolized

Senator **Heflin**. Can we have the next panel, Mr. Lee McDonough, executive vice president of the Smaller Manufacturers Council, and Bernard Schramm of Green Bay Packaging.

Whoever would like to start.

STATEMENT OF MEMBERS OF PANEL CONSISTING OF LEO R. McDONOUGH, EXECUTIVE VICE PRESIDENT, SMALLER MANUFACTURERS COUNCIL, PITTSBURGH, PA; AND BERNARD H. SCHRAMM, SECRETARY AND GENERAL COUNSEL, GREEN BAY PACKAGING, GREEN BAY, WI.

Mr. **Schramm**. I am Bernard Schramm.

I am secretary and general counsel for Green Bay Packaging, Inc., of Green Bay, WI. My company is primarily engaged in the business of manufacturing and selling corrugated shipping containers. We are an integrated company—that is, we own and operate the woodlands and paper mills which supply our box plants with raw materials. In our industry, our family-owned company is the smallest of the integrated companies, yet from a technical standpoint, we are considered a leader.

I am also a member of the Council on Antitrust Policy of the U.S. Chamber of Commerce, and I am here today to express the chamber's views on S. 915, a bill to overrule the Supreme Court decision in the case of *Illinois Brick*. Accompanying me is Fred Byset, the chamber's senior counsel for antitrust policy.

I have submitted a written statement and I would like it to be incorporated into the record

Senator **Heflin**. It will be entered.

Nearly 6 years ago, at the very first hearings on legislation of this purpose, a chamber witness testified in opposition. Nothing has happened since then to cause us to change our minds. We continue to oppose any effort to overturn the direct purchaser rule of the Supreme Court in *Illinois Brick*. That is, we agree with the Court that only the first or direct purchaser from an alleged antitrust violator should have a right to sue for damages. All rights of action should be cut off at that point.

Our reasons today for opposing the overturn of *Illinois Brick* are much the same as they were back in 1977. By confining damage actions to direct purchasers, the Supreme Court struck a delicate balance between, one, fairness to defendants and, two, effective enforcement. If the ruling is overturned, these concerns would be seriously jeopardized.

The chairman and founder of Green Bay Packaging, George F. Kress, has been a leader in attempting to correct some of the inequities in the current antitrust enforcement procedures. His interest was spawned by the company's involvement in the recent corrugated container class actions. Our experiences of having to pay over $5½ million in settlement, even though a jury subsequently determined that we were not a party to any conspiracy, provides a sound example of the shortcomings of our current antitrust enforcement system.

We believe, both the company and the chamber, that some changes in the system are necessary to give innocent defendants protection against the kind of coercive settlement demands that

Green Bay faced in the corrugated case. Instead of providing that relief, however, we feel S. 915 would aggravate the problem by expanding the scope of antitrust exposure, and by opening us to another layer of intimidation. Business as a whole, and small business such as Green Bay in particular, cannot accept the imposition of these added legal burdens.

Economic times are difficult right now. Even though they are getting better, to add additional legal burdens takes away from that bottom line.

In consumer class actions which may involve billions of dollars, pressures on the innocent to settle could even be greater. Although directed by State attorneys general, actions of this nature will, in all likelihood, be conducted by private attorneys whose measure of compensation will depend on the amounts collected.

In your recent question, Senator, I believe you commented—that the figure of a $2 recovery on a damage was referred to and it seems that a great deal of money might be expended by business in order to insure that one party out there is going to receive $2 back.

The primary goal of antitrust actions for damages is deterrence, and deterrence is greater when direct purchasers are relied on as the principal source of private enforcement. They have the most incentive; their claims are usually large; they are in the best position to detect violence; and their chances of recovering undiluted awards are more certain.

Let me just say in conclusion, as we look at damage action enforcement we feel that Congress is obligated to balance the interests of defending businesses, consumers and the courts, as well as the remedies given to plaintiffs. S. 915, unfortunately, fails to develop or fully consider this clear need for balance.

For defending business firms, the bill would aggravate the already intolerable atmosphere of intimidation caused by unlimited class action demands—the very thing that has made Green Bay Packaging so painfully conscious of the inequities in antitrust enforcement.

For consumers, the bill would remove the certainty of effective and fair long range deterrence, and substitute short term promises of small payments for injuries caused by alleged violations.

We feel that for the courts it would compel the unraveling of impossibly complex factual situations which you have referred to, Senator, such as those described in the *Illinois Brick* decision.

The direct purchaser rule gives account to all of these problems and should be retained. Measure to overrun the rule, such as S. 915, should be rejected.

Thank you.

Mr. McDONOUGH. My name is Leo McDonough and I am the executive vice president of the Smaller Manufacturers Council [SMC]. Accompanying me today is Charles A. Price, an antitrust litigation specialist with the Washington law firm of Randall, Bangert & Price.

We have submitted a written statement and I would like to touch on parts of it with some deviations.

Senator HEFLIN. Your statement will be made a part of the record.

Mr. McDonough. SMC was founded in 1945 by 16 small manufacturers who believed that together they could accomplish common goals on behalf of the small manufacturer that each company acting alone could not. Today, SMC consists of more than 1,500 member companies representing more than $1.8 billion in annual sales, and employing nearly 55,000 people.

You will notice in the prepared statement that employment was said to be nearly 100,000. Economic conditions in the last few years have dropped it down to almost half.

SMC is also a founding member of the Coalition of Small Independent Business Associations and of Small Business United that together represent more than 5.5 million small businesses throughout the United States.

I am appearing before you today to testify on the merits of S. 915, a proposed amendment to the Federal antitrust laws. In essence, S. 915 would reverse the Supreme Court's ruling in *Illinois Brick*, to permit the several States and the Federal Government to prosecute civil antitrust damage suits on their own behalf in cases where they are indirect purchasers and also permit the States, as parens patriae to prosecute antitrust suits in cases where the represented class of individuals are indirect purchasers. S. 915 would also reverse the Supreme Court's holding in *Hanover Shoe* v. *United Shoe Machinery Corp.*, to permit a defendant in any antitrust civil damage action to prove as an affirmative defense that some or all of a plaintiff's alleged monetary damages had been passed on to the Federal or State governments or to individual consumers entitled to be represented in a *parens patriae* action, and require that whenever the defense is pled, that the appropriate attorney general be joined in the action as an indispensable party.

I'm not a lawyer and I have no legal background, but I would like to go over to page 3 of my prepared statement, if I may, to the quote from the Supreme Court that says:

> Permitting the use of pass-on theories . . . essentially would transform treble-damage actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However, appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness.

To highlight what I am trying to say, I would like to leave my text for a minute and imagine that I am a wagon manufacturer and I buy my tires from either Firestone or Goodyear, whichever you care to use, and I find out that there has been a price fixing situation between the tire companies and so as a plaintiff I have been wronged and I am innocent of any wrongdoing myself in this particular instance, so I sue Firestone.

Instead of being able to just sue Firestone and to be able to expect any damages that I might have incurred, they, under this amendment, as I understand it, would be able to raise the defense that some or all of the illegal overcharge was passed on to consumers and bring into the case as additional plaintiffs the State attorneys general, and my small company in the meantime is tied up in court. What should be a fairly simple case will become a very complicated one. The expense of all this could well expand to such a degree that it could possibly even put me out of business.

So I have to make a business decision, am I going to sue or just sit by and let it happen, because I cannot afford to drag through this situation.

Another case could be where I am a completely innocent third party in the chain of distribution where the attorney general sues Firestone for price fixing and my small business, as one of the distributors of those tires, is now caught in the middle, and while the State and Firestone fight it out, I am forced to hire legal counsel that I cannot afford, I am forced to put in time that I cannot afford to be away from my business, my books will be torn apart publicly, which puts me at a rather bad competitive edge, all in a case where I have done nothing other than try to run a business.

In situations where I am a defendant, I may be totally innocent, but the State may sue me simply because I appeared before the grand jury. I will have serious legal costs. I will lose valuable time away from my business. If I have a financial situation where I must get refinancing or anything like that I would have a very difficult time trying to convince a bank to back me with such a claim against me.

I submit to you, Senator, that S. 915 is very much like OSHA. OSHA had all the earmarks of being a very good bill. Who could ever pick a fight with somebody who says, "we want to protect the worker from being hurt at his workplace"? Even the employer could not oppose that, nor would they want to.

But when you take these kinds of ideas and then go into the actual practice, we find that they get distorted so completely away from what they were meant to be that the repercussions are too costly. As in the case of OSHA, I think the drafters of the bill had the best of intentions, but a few years after it was out there and we had to live with it and we paid the billions of dollars to try to comply, they finally decided that they had gone too far, they started to back off and reneged and changed many of the conditions.

The other part of S. 915 that scares me is we know for a fact anytime there are cases where the Justice Department is concerned or—even attorney generals are not exempt, many times they go after small businessmen that do not have the money to carry on a long fight, and they look at it through the eyes of how long they will be in a particular situation. Rather than tackle a major corporation they zero in on the smaller ones and say, here is one we can clean up in 6 months or 1 year.

So we become the target of these kinds of suits and we are the ones who bear the brunt of them.

To conclude, I could only call your attention again to my prepared statement where we talk about the importance of small business, the fact that small business is a job creator, the fact that as far as we are concerned it is small business that will take us out of this problem we are in now with this economy, because that is where the jobs are, and anything that makes it more expensive for small businesses to operate or that makes it just that much tougher for us to make it each day will cut into those very things that we are depending on to pull us out of our economic problems.

Thank you.

Senator HEFLIN. Thank you very much.

The **Chairman** [presiding]. Mr. McDonough, there has been much discussion about the use of assignment clauses to protect the proprietary interests of the States.

As a small businessman who might be entering contracts containing such assignment clauses, how do you feel about their use?

Mr. **McDonough**. Well, I think pretty much what I just said in my testimony, that the more this is expanded, the more indirect people that are involved in it, the more expense that becomes involved in it, and the more costly and the more time consuming and the more damaging to a small business it becomes.

So, I really—I cannot see any redeeming features to this bill at all.

The **Chairman**. Mr. Schramm, you have said that direct purchasers have the most incentive to sue antitrust violators. Other witnesses have testified that direct purchasers may not sue because of fear of damaging supply relationships.

What is your response to this?

Mr. **Schramm**. With the free enterprise system, anybody who wants to buy anything and has evidenced that desire in the United States today, has at least one or two people to sell to them. It is certainly true in our business.

There are ample suppliers for most products and I really do not buy the argument that someone is going to be coerced because of a shortage of supply. There really have not been so many shortages of supply that have lasted long enough to intimidate people from bringing suits against price fixers or conspirators.

I just do not think there is any validity to that argument.

The **Chairman**. Now we may have some other questions that we will send you if you would not mind answering those questions.

The Chamber of Commerce had a statement, I believe, that we will put into the record.

Mr. Byset, I want to commend you for your long service at the Chamber.

I understand you are thinking about retiring.

Mr. **Byset**. This I expect is my last hearing.

The **Chairman**. You are a mighty young man to be thinking about retiring.

Mr. **Byset**. I just like long weekends, Senator.

The **Chairman**. Well, good luck to you, and we wish you good health and happiness in your retirement.

Keep up some hobby. Do not just do nothing. People that retire and do nothing, then they just fade away. We do not want to see you fading away.

Mr. **Byset**. Thank ~~you very much,~~ Senator, for your good wishes.

The **Chairman**. I think that completes our hearing today.

Now, I would also like, when you answer these questions that we send to you, if you would give us, in the event the committee wants to modify or amend this bill some, what changes you suggest.

The committee may vote against any changes but if they should vote to make some changes, then how could this bill be made palatable, as far as you see it, and as much as you see it

Thank you very much.

The hearing is now adjourned.

[Whereupon, the hearing was concluded at 12:25 p.m.]

[Prepared statements follow:]

PREPARED STATEMENT ON ILLINOIS BRICK LEGISLATION (S. 915) BY BERNARD H. SCHRAMM

I am Secretary and General Counsel for Green Bay Packaging, Incorporated, of Green Bay, Wisconsin. My company is primarily engaged in the business of manufacturing and selling corrugated shipping containers. We are an integrated company—that is, we own and operate the woodlands and paper mills which supply our box plants with raw materials. In our industry, our family owned company is the smallest of the integrated companies, yet from a technical standpoint, we are considered a leader.

I am also a member of the Council on Antitrust Policy of the United States Chamber of Commerce, and I am here today to express the Chamber's views on S. 915, a bill to overrule the Supreme Court decision in the case of *Illinois Brick*. Accompanying me is Fred Byset, the Chamber's Senior Counsel for Antitrust Policy.

Nearly six years ago, at the very first hearings on legislation of this purpose, a Chamber witness testified in opposition. Nothing has happened since then to cause us to change our minds. We continue to oppose any effort to overturn the direct purchaser rule of the Supreme Court in *Illinois Brick*. That is, we agree with the Court that only the first or direct purchaser from an alleged antitrust violator should have a right to sue for damages. All rights of action should be cut off at that point and remote purchasers should not be given standing to sue.

We see very little difference between proposals of the past and the crurent bill to promote: Indirect purchaser actions by States in their proprietary capacities; Consumer class actions (*parens patriae* cases) by the States; and, Indirect purchaser actions by the Federal Government in its proprietary capacity.

Our reasons today for opposing the overturn of *Illinois Brick* are much the same as they were back in 1977. By confining damage actions to direct purchasers, the Supreme Court struck a delicate balance between (1) fairness to defendents and (2) effective enforcement. If the ruling is overturned, these concerns would be seriously jeopardized.

The Chairman and founder of Green Bay Packaging, George F. Kress, has been a leader in attempting to correct some of the inequities in the current antitrust enforcement procedures. His interest was spawned by the company's involvement in the recent corrugated container class actions. Our experience of having to pay over five and one-half million dollars in settlement, even though a jury subsequently determined that we were not a party to any conspiracy, provides a sound example of the shortcomings of our current antitrust enforcement system.

We believe both the company and the chamber that some changes in the system are necessary to give innocent defendants protection against the kind of coercive settlement demands that Green Bay faced in the corrugated case. Instead of providing that relief, however, we feel, S. 915 would aggravate the problem by expanding the scope of antitrust exposure, and by opening us to another layer of intimidation. Business as a whole, and small business such as Green Bay in particular, cannot accept the imposition of these added legal burdens.

Possibly, it will be said that pressure tactics will not characterize actions under S. 915, because most cases will be conducted or supervised by state attorneys general. The obvious answer is that such pressures are inevitable in litigation where the object is to collect huge sums of money, and that is clearly the goal here.

In consumer class actions which may involve billions of dollars, pressures on the innocent to settle could even be greater. Although directed by state attorneys general, actions of this nature will, in all likelihood, be conducted by private attorneys whose measure of compensation will depend on the amounts collected. Actually, the attorneys could probably expect much greater benefit than the consumers they would represent.

The primary goal of antitrust actions for damages is deterrence, and deterrence is greater when direct purchasers are relied on as the principal source of private enforcement. They have the most incentive: their claims are usually large; they are in the best position to detect violations; and their chances of recovering undiluted awards are more certain.

Passage of S. 915, or other legislation to promote actions on behalf of remote purchasers, would seriously weaken this direct purchaser incentive, and overall enforcement would suffer in the process. Very probably, lawyers for remote buyers would only bring suits in the more highly publicized and flagrant cases. Since they do not deal directly with alleged violators, remote buyers—and the lawyers acting for them—would have little chance of detecting and proving lesser violations.

Possibly, they could wait strategically for actions started by direct purchasers before starting their own. That way, lawyers for indirect purchasers could seize the benefit of direct purchaser detection and proof. It might work for a short time, but very quickly the incentive for direct purchaser actions would disappear. The cost and trouble in antitrust litigation is much too great already. Direct purchasers could not afford to sue, knowing that others could undermine their cases and claim the winnings.

Let me just say in conclusion, if we look at damage action enforcement, we feel that Congress is obligated to balance the interests of defending businesses, consumers and the courts, as well as the remedies given to plaintiffs. S. 915, unfortunately fails to develop or fully consider this clear need for balance.

For defending business firms, the bill would aggravate the already intolerable atmosphere of intimidation caused by unlimited class action demands—the very thing that has made Green Bay Packaging so painfully conscious of the inequities in antitrust enforcement.

For consumers, the bill would remove the certainty of effective and fair long range deterrence, and substitute short term promises of small payments for injuries caused by alleged violations.

We feel for the courts, it would compel the unraveling of impossibly complex factual situations which you have referred to Senator, such as those described in the *Illinois Brick* decision.

The direct purchaser rule gives account to all of these problems and should be retained. Measures to overturn the rule, such as S. 915, should be rejected.

Thank you.

CHAMBER OF COMMERCE OF THE UNITED STATES,
Washington, D.C., June 28, 1983.

Hon. STROM THURMOND,
Chairman, Senate Judiciary Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: At the hearing of June 8 on S. 915, the Illinois Brick Bill, you invited us to suggest changes that would make the legislation acceptable to business. Thank you for giving us this opportunity, but we do not see any possibility of amendment that would make the proposal less objectionable.

As we said in our formal statement, the legislation is flawed in concept, and technical modifications cannot change that fact.

Thank you again for your courteous reception at the hearing.

Sincerely,

FRED BYSET, SR.,
Counsel Antitrust Policy.

STATEMENT OF LEO R. MCDONOUGH, EXECUTIVE VICE PRESIDENT, SMALLER MANUFACTURERS COUNCIL, PITTSBURGH, PA.

Mr. Chairman: My name is Leo McDonough and I am the Executive Vice President of the Smaller Manufacturers Council, (SMC). Accompanying me today is Charles A. Price, an antitrust litigation specialist of the Washington Law Firm of Randall, Bangert & Price. SMC was founded in 1945 by 16 small manufacturers who believed that together they could accomplish common goals on behalf of the small manufacturer that each company acting alone could not. Today, SMC consists of more than 1,500 member companies representing more than 1.8 billion dollars in annual sales, and employing nearly 55,000 people. SMC is also a founding member of the Coalition of Small Independent Business Associations and of Small Business United that together represent more than 5.5 million small businesses throughout the United States.

I am appearing before you today to testify on the merits of S. 915, a proposed amendment to the federal antitrust laws. In essence, S. 915 would reverse the Supreme Court's ruling in *Illinois Brick* to permit the several states and the federal government to prosecute civil antitrust damage suits on their own behalf in cases where they are indirect purchasers, and also permit the states, as *parens patriae,* to prosecute antitrust suits in cases where the represented class of individuals are indirect purchasers. S. 915 would also reverse the Supreme Court's holding in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, to permit a defendant in any antitrust civil damage action to prove as an affirmative defense that some or all of a plaintiff's alleged monetary damages had been passed on to the federal or state governments or to individual consumers entitled to be represented in a *parens patriae* action, and require that whenever the defense is plead, that the appropriate Attorney General be joined in the action as an indispensable party.

At first glance S. 915 may appear to have some superficial appeal. Upon further study, however, it is clear that S. 915 will ultimately cause substantial and irreparable harm to the small business community by significantly increasing the already astronomical costs of prosecuting or defending an antitrust suit which even today effectively forces small businesses to forego pressing legitimate claims and to settle what are honestly believed to be baseless claims because "it is cheaper to settle than to fight" even when one is ultimately proven innocent.

In *Hanover Shoe* the Supreme Court held that a defendant manufacturer in a private antitrust suit could not avoid liability by showing that the plaintiff, who had purchased the products concerned directly from the defendant, had "passed-on" alleged illeged overcharges to its own customers. The principal reason for the Court's holding was its express reluctance to further complicate treble-damage actions with attempts to prove and disprove the effects of alleged antitrust violations on prices, sales, costs and profits throughout the distribution chain.

Nine years later, the Court completed the circle with *Illinois Brick* by holding that just as the defendant in *Hanover Shoe* could not shield itself behind a "pass-on" defense, a "pass-on," or indirect purchaser plaintiff had no standing to prosecute a civil antitrust damage action. Once again, in principal support of its decision the Court observed that: "Permitting the use of pass-on theories . . . essentially would transform treble-damage actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However, appealing this attempt to allocate the over-charge might seem in theory, it would add whole new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness."

Thus, under present law, except in the case of "cost plus" contracts, where manufacturers or other sellers allegedly engage in antitrust violations, only direct purchasing customers from the defendant seller during the period of the violation are entitled to sue for damages, and, conversely, the seller is liable to his customers for all damage caused, and cannot set off all or any part of the damage by showing that the plaintiff "passed on" the damage to its own customers. Nothing has happened since *Hanover Shoe* and *Illinois Brick*, to refute the Supreme Court's analysis that permitting the use of "pass-on" theories will necessarily add further layers of complexity to what are universally acknowledged to already be highly complicated and expensive law-suits, that will seriously undermine the effectiveness of the private damage action as a deterrent to antitrust violators.

Although masquerading as a very "limited" modification of current law, S. 915 in fact will more likely serve to create nightmarish situations for any business, particularly a small business, that has the misfortune to come anywhere near an alleged antitrust violation, let alone actually participate in the suit as a party. For example, under S. 915 assume a situation where a manufacturer who has allegedly engaged in a price fixing conspiracy is sued by a state that purchased the manufacturer's alleged price fixed product from a small dealer or distributor, or as part of a larger product fabricated by a small manufacturer. With an indirect purchaser as plaintiff, one of the most critical questions to be resolved, even assuming that the price fix is proven, is the amount of damage actually suffered. Even though not a party to the law suit, the small business in this situation, unwittingly and with no recourse, will become the battleground over whose body the parties will wage a prolonged and costly fight attempting to prove and disprove, just as the Supreme Court foresaw 15 years ago in *Hanover Shoe*, the effects of the violations on prices, sales, costs and profits through the chain of distribution.

In similar fashion, the small business as a plaintiff in a price fixing suit will be driven from the courtroom by the additional costs generated by S. 915. For example, assume a small wholesaler or distributor sues one of his manufacturers for damages arising out of a price fixing conspiracy. Under S. 915 the manufacturer will undoubtedly respond that, even if there was a price fix as charged, the wholesaler passed on at least 50 percent of any overcharges to his retailer customers who, in turn, passed them on to consumers. Thereafter the State Attorney General who, as *parens patriae*, has been joined in the suit as a party plaintiff by virtue of S. 915, pleads that at least 80 percent of the manufacturer defendant's overcharges were passed on to consumers. Returning to our small business plaintiff, he admits that he did pass on some of the overcharge, but not more than 20 percent.

The resolution of these pleadings by attempting to track the effect of the defendant's overcharges on prices, sales, costs and profits throughout the chain of distribution, if indeed they can ever be truly resolved, will take months and months of time and thousands and thousands of dollars. To the small business plaintiff this needless complication and increased expense of the antitrust process may very well complicate and delay resolution of antitrust claims long enough to put them out of business. And, more likely than not, the small business simply will not have the financial resources to afford to prosecute such an action to begin with, and will effectively be denied one of its most potent weapons for survival. This result is inequitable and unnecessary.

Another very real concern of small business is that the State Attorneys General will simply track directly behind Department of Justice Grand Jury actions with their own private suits. It is no secret that the Department has historically used a dragnet approach in Grand Jury proceedings, pulling in many small businesses that are never ultimately indicted. Treble damage plaintiffs following Grand Juries, however, usually make no distinctions between those who are indicted and those who are not and name as parties all companies brought before the Grand Jury. To the small business caught up in such a proceeding, no matter how innocent it may in fact be, the effect is always economically devastating. To defend against even an unfounded treble damage suit is an extremely expensive process. The question then arises as to whether a settlement should be negotiated simply to get rid of the matter as cheaply as possible or to attempt to prove one's innocence. With changing legal antitrust theories, especially in the vertical restraint area, this is never an easy choice. If small business guesses wrong on the applicable theory or the cost of defense it could break the company. Additionally, it will have to report its potential liability (even though ultimately found innocent) to creditors and prospective lenders which may chill or cut off the flow of needed capital. As a result, many small businesses have no practical choice other than to settle antitrust claims even though they believe that they are innocent. Presently, small business already faces those difficult choices in direct purchaser actions. To now further expand this risk exposure to include persons with whom we have never even done business makes no sense at all. In this regard, I would recommend for the attention of the members and staff of this Committee the attached statement of X Corporation presented to this Committee by then Senator Gaylord Nelson on March 19, 1979, which provides in gripping detail the problems faced by a small business in the situation where it was caught up in just such an antitrust case. Although this bill does not extend indirect purchaser actions to private parties, we believe the situation described in that statement is nevertheless applicable to this legislation. The bill also exposes business to the potential of multiple recoveries. There is no provision in the legislation for assuring that all potential claimants will in fact be combined into a single action. Thus, a small manufacturer could be liable to a direct purchaser in one suit and to a State Attorney General in another as an indirect purchaser for the same transaction.

Antitrust litigation, as we all know, is already terribly complex and consumes exorbitant amounts of money and time. In 1977 the Department of Justice Committee on Revision of the Federal Judicial system advised that the federal court overload was so serious that it had become ". . . a crisis for litigants who seek justice, for claims of human rights, for the rule of law . . ." And just last month the Supreme Court promulgated recommendations in an effort to shorten litigation proceedings. Ironically, the legislation being considered here today will have exactly the opposite effect.

Mr. Chairman, obviously, I could not appear before any Congressional Committee without once again attempting to impress upon the Members the importance of small business to our economy ~~and~~ our country. In that regard I would like to commend for your study the most recent report of the Small Business Administration on the State of Small Business in our country. In this Report you will that small business produces 2.5 times as many innovations as large firms, that on average it takes 2.22 years for small firms to bring innovations to market as opposed to 3.05 years for large firms, that during the 1981-82 recession small business dominated industries were able to retain employees better than large business. However, you will also see that small business' share on the "Gross Private Domestic Product Originating" (GPO) is declining while that of large firms has been increasing. You will also notice that for 1982 there was a 49 percent increase in small business failures over 1981.

Small businesses are, moreover, the chief employment generators in the economy. Small businesses, and particularly small manufacturers, have much to contribute to the current recovering economy. This legislation will dampen the contributions small businesses can do make to the economy by increasing the thing small businesses work hardest to avoid—fixed costs. Small business will be forced to seek the advice and counsel of highly trained and very expensive antitrust lawyers and economists. To operate without such advice would be to risk an antitrust suit that a company could not survive. Obviously, all businesses will face these problems, but small business is at an inherent disadvantage since its ability to spread and absorb such costs is limited by its smaller sales base. These costs severely dimish small business's inherent flexibility, creativeity and price competitiveness. For small business, S. 915 will simply foster more and more such no-win dilemmas, the inevitable result of which will be the further decline of small business in this country.

Mr. Chairman, SMC affirmatively supports strong antitrust enforcement at all levels, whether federal, state or private. Such enforcement helps assure that our members are treated fairly by our large competitors, customers and sellers. However, we believe that S. 915 will only serve to complicate and thereby weaken federal antitrust enforcement. For all of these reasons we respectfully oppose this legislation.

THE TAXPAYER ANTITRUST ENFORCEMENT ACT OF 1983

(Illinois Brick)

WEDNESDAY MAY 16, 1984

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 10:12 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Metzenbaum and Grassley.

Staff present: W. Stephen Cannon, chief antitrust counsel; Joseph Gibson, research assistant; Alice R. Milder, Senator Grassley's staff; and Stephen F. Ross, Senator Metzenbaum's staff.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

Today the committee continues its consideration of S. 915, the Taxpayer Antitrust Enforcement Act of 1983. This legislation, which partially overrules the 1977 *Illinois Brick* decision, would amend the Clayton Act to permit proprietary suits by the States on behalf of themselves and local governments—parens patriae suits—and by the Federal Government, all as indirect purchasers. In addition, S. 915 would also provide a pass-on defense for defendants, thus reversing the 1968 *Hanover Shoe* decision.

Since the committee's last hearing on this legislation, Senator Gorton has proposed an amendment in the nature of a substitute that would make substantial changes, particularly as regards the calculation of damages for indirect purchasers permitted to sue under S. 915.

The author of this amendment, the distinguished Senator from Washington, is with us for this hearing. I look forward to hearing his testimony and that of the other witnesses here today, and we are very pleased to have Senator Gorton with us.

Senator Gorton, you may now proceed.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator Gorton. Thank you very much, Mr. Chairman, and thank you also for holding this second hearing on S. 915. This proposal, as you have said, will be discussed as an amendment in the nature of a substitute to S. 915. It was developed as a result of the insightful comments of the chairman and of other members who attended the last hearing on the bill.

At each juncture in this process, Mr. Chairman, I have listened with an open mind to the concerns expressed by members of the committee and opponents of the bill. I have done my best to accommodate all of the legitimate concerns which I have heard expressed. I remain ready and willing to discuss those concerns with respect to this bill and to the extent possible, to remedy the deficiencies which they may perceive in it. But I do not intend to abandon my effort to enact a partial override to the *Illinois Brick* case in the interests of justice.

After this amendment to S. 915 was developed and reviewed by the business community, a two-page critique of the proposal, dated February 1, 1984, was produced. I believe that the critique was drafted by the business roundtable, but because there is no claim of authorship on the face of the document, I hesitate to brand that association as its source.

In that paper, however, the authors reiterate concerns which, in fairness, ought to have been admitted to be addressed by the amendment. They allude to potential unsettling hypotheticals, which are precisely that—hypotheticals, for which there was no precedent before the decision in *Illinois Brick*.

At the close of this document, the author makes the following statement, and I quote, "Congress has now been wrestling with *Illinois Brick* issues off and on for more than 6 years. It is now appropriate to lay this controversy to rest, to leave well enough alone, and to recognize that the Supreme Court was right all along."

Mr. Chairman, I should like to put the authors of this document on notice that this controversy will not be laid to rest until it is resolved fairly and justly by an override of the decision which the Supreme Court felt to be compelled by existing law, but which it invited the Congress to correct.

I think I am safe in speaking for Senator Rudman in this respect as well. It is time to lay this controversy before us on the table and to work out a procedurally suitable proposal which will protect the public treasuries of this country and insure that direct purchasers are not reaping windfall recoveries at the taxpayers' expense.

Mr. Chairman, in the course of the past several weeks, the Senate has had before it a number of proposals by which to put a down payment on the Federal deficit. I am not going to argue here that a partial override to *Illinois Brick* will contribute significantly to such a reduction in an enormous deficit with which we must deal, or that similarly it will lead to significant revenue enhancement at the State level.

But I do believe that it is appropriate to develop a manner in which misspent public funds are returned to the public treasuries of this country rather than to the pockets of private businesses as compensation for injuries they never sustained.

In reviewing my notes from the last hearing, I noticed that it may be less than clear to some members of the committee who have not had to deal with this issue since it first arose that the rule of *Illinois Brick* permits a purchaser dealing directly with a price-fixer to reflect the increased cost of product due to the price-fix in the cost of the good to a State or local government, thereby suffering no injury as a result of the price-fix, and nonetheless to sue the price-fixer for three times the cost of the price-fix.

Meanwhile, the State or political subdivision simply has no remedy by which to recover for the increase in the price of the goods due to the price-fix. In my view, if the public fully understood that this situation is now commonplace under our antitrust laws, they would be outraged.

Mr. Chairman, based on previous complaints about the potential unlimited scope of an *Illinois Brick* override bill, this bill has been limited so that only the Attorneys General of the States and of the United States may bring an action.

This amendment simplifies the calculation of the damages issue in such a way that virtually all complexity is eliminated. Parties between the direct purchaser and the indirect purchaser are irrelevant to the indirect purchaser's calculation of damages.

The defendant is protected from the prospect of multiple recoveries for the same injuries and is limited in liability to three times the original price-fix. Any court could, under this bill, bifurcate the trial and decide the issue of liability first and then excuse the defendant while the direct and indirect purchasers determine the appropriate allocation of damages.

In short, the bill is significantly more limited than any previous proposal. In my last appearance before this committee on this issue, I was asked why it was not sufficient to allow the States to simply pass State *Illinois Brick* override legislation. The answer to that question can be found in the ABA task force report on S. 915, as it was originally introduced. In that report, the task force noted, and I quote:

> The state statutes compound the problems the Supreme Court sought to eliminate in *Illinois Brick*. Because there can be simultaneous federal direct purchaser actions and state indirect purchaser actions, defendants are exposed to risks of multiple liability. Discovery and pre-trial proceedings in state courts are not always coordinated with federal court proceedings, which can result in inefficiency and duplication of effort.

In this respect, then, defendants and direct purchasers are actually better served by Federal legislation which would allow the attorneys general to coordinate their efforts in a single forum than they are by the status quo.

Further on in the ABA task force report, the task force finds that, and I quote again, "As a practical matter, compensation objectives must sometimes give way to manageability and fairness." The current state of the law abandons any notion of compensation altogether. Since the *Illinois Brick* decision, direct purchasers have been acting as no more than bounty hunters. I utterly fail to understand how parties who advocate the continuation of the status quo without so much as a passing nod at working out a limited compromise on this issue can speak of fairness at all. The current situation is not fair. It is not fiscally prudent and it is not sound public policy.

Once again, I invite any member of the committee, the business community, the legal community or any other interested party to sit down with the sponsors of this legislation to develop a workable compromise. This invitation goes most particularly to the ABA antitrust section because of the statements we have just read.

This issue will not disappear, and if legislation is not enacted this year we will continue our efforts in the next Congress.

Mr. Chairman, I should like to add that my distinguished colleague, another former attorney general, Senator Rudman, was to testify here this morning, but must chair a defense appropriations subcommittee meeting. He requests that the record be kept open for a short time so that he may comment.

The CHAIRMAN. Thank you very much, Senator. We had a few questions, but I know how busy you are. Could we just submit them to you to answer for the record?

Senator GORTON. I think that would not only be helpful to me, but because of your time constraints today it would give other witnesses a chance to testify, and so I thank you.

The CHAIRMAN. Thank you very much. Thank you, Senator, for your testimony.

Senator METZENBAUM. Mr. Chairman?

The CHAIRMAN. Senator Metzenbaum?

Senator METZENBAUM. Mr. Chairman, I do not want to impose upon the time because we are all aware that there is a joint session of Congress to hear the President of Mexico. However, I do have an opening statement and, with your permission, I will just put it in the record.

The CHAIRMAN. Without objection, it will be done.

[The following was received for the record:]

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

I am pleased to be here today to listen to the views of two Senators with such a proven record of vigorous antitrust enforcement, my friends from Washington and New Hampshire. I join them in supporting S. 915, the Taxpayer Antitrust Enforcement Act.

This bill would modify the Supreme Court's decision in *Illinois Brick* v. *Illinois*. Passage of this legislation is long overdue.

It is absolutely absurd to think that consumers who have paid overcharges as a result of price fixing activity cannot be compensated for their injury. Yet that is precisely the effect of *Illinois Brick*. That decision turned antitrust law on its head, barring indirect purchasers from bringing private damage actions against antitrust violators while permitting middlemen who suffered no injury to earn windfall awards.

In many, if not most, industries, manufacturers who agree among themselves to fix prices sell to wholesalers and retailers, who pay the inflated price and pass on the illegal overcharge to the ultimate consumer. Under *Illinois Brick* these consumers have no remedy.

Who are these consumers? They're average citizens—small businesspeople, individual consumers, and taxpayers whose tax dollars are wasted on illegal overcharges paid by State and Federal agencies for goods they consume. Previous hearings before this committee demonstrated that 90 percent of State government purchases were made indirectly through middlemen.

S. 915 addresses part of this problem by permitting Federal and State governments to sue for damages under the antitrust laws for themselves, as indirect purchasers, and on behalf of citizens of their States who are indirect purchasers.

Personally, I would favor legislation which totally overruled *Illinois Brick*, so that small businesspeople and consumers could also bring suits as indirect purchasers. But, despite its limits, this bill does have merit. Furthermore, limiting potential plaintiffs to direct purchasers and 50-plus attorneys general eliminates many of the technical objections previously lodged against this type of legislation.

Let me add one more reason why this bill has merit. By permitting State attorneys general to sue on behalf of indirect purchasers, we are giving these vigorous enforcers of our antitrust laws an important weapon, which will not only provide compensation for injured consumers but provide an incentive for even stronger State antitrust enforcement. Perhaps in the days of bipartisan Federal antitrust enforcement, strong State enforcement was a luxury. Today, though, with the Reagan antitrust agencies refusing to effectively enforce these laws designed to ensure free and fair competition, only State a.g.'s are around to protect consumers against injuries which can't be explained under the rigid, unrealistic economic theories embraced by this administration.

I look forward to this hearing and to prompt Judiciary Committee action to report S. 915 to the Senate floor.

The CHAIRMAN. Our next witness—Senator Rudman was to appear, but I understand he will not be here—is the Honorable William M. Leech, Jr., attorney general, State of Tennessee, on behalf of the National Association of Attorneys General.

Attorney General Leech, we are pleased to have you with us, and on account of the numerous witnesses I wonder if it would suit you to put your entire statement into the record and maybe take about 5 minutes and just summarize it.

STATEMENT OF HON. WILLIAM M. LEECH, JR., ATTORNEY GENERAL, STATE OF TENNESSEE, ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ACCOMPANIED BY HON. JOSEPH HAYNES, SPECIAL DEPUTY ATTORNEY GENERAL, STATE OF TENNESSEE

Mr. LEECH. That will be fine, Senator.

I am here today and I do appreciate the opportunity to be with you, and I have with me Joe Haynes, who is a special deputy attorney general in our office who has over the years been actively involved in antitrust litigation within the State of Tennessee.

I am here in a dual capacity; first of all, as chairman of the Antitrust Committee of the National Association of Attorneys General, as well as the attorney general for Tennessee.

We are not new to this particular issue, in that since the *Illinois Brick* decision the States have been virtually left without a remedy since a very large percentage of all of the State purchases are indirect purchases, and our ability to pursue the tremendous loss to taxpayers has been impaired.

It has caused a chilling effect on all antitrust enforcement in our proprietary capacity, and that is not to even address the parens patriae capacity which we enjoy by virtue of congressional authority.

I would like to point out one thing and I will just anticipate some of the discussion. It has been said that the States can operate through various other modes to go for recovery. But I would submit that it is important for Congress to act in this area since nearly all of the States' antitrust enforcement laws have as their guidepost the Federal scheme of enforcement.

I would also point out that simply equity would indicate to any defendants involved in price-fixing and bid-rigging that they not be subjected to a series of State enforcement patterns, but rather be able to avail themselves of even multidistrict litigation in which they can assert these defenses of pass-on and all of the parties can be brought in.

I think S. 915 addresses all of the concerns which were set forth by the Court in *Illinois Brick,* and while it does not alleviate the complexity of all litigation in the antitrust area, because it cannot do that because we are in a complex area, it is manageable and I think the complexity of this kind of litigation has been overrated to begin with.

I also have, if I may, Senator, a letter which I would ask to file into the record from the Honorable Bruce Babbitt, Governor of the State of Arizona, relative to the position of the Governors.

[The aforementioned letter follows:]

BRUCE BABBITT
GOVERNOR

OFFICE OF THE GOVERNOR
STATE HOUSE
PHOENIX, ARIZONA 85007

IN REPLY
REFER TO:

May 18, 1984

The Honorable Strom Thurmond, Chairman
Committee on the Judiciary
United States Senate
The Capitol
Washington, DC 20510

Dear Chairman Thurmond: Re: S.915, "The Taxpayer Antitrust Enforcement Act of 1983," as amended.

I am writing to you and to the members of the Judiciary Committee to express my support for S.915, "The Taxpayer Antitrust Enforcement Act of 1983," as amended.

As state officials, we are obliged to provide governmental services to our citizens in the most effective and cost-efficient manner. When we see the costs of our highways, buildings, and other necessary services inflated by illegal price fixing and bid rigging, we are outraged and frustrated that seven years after Illinois Brick, we still lack a remedy that would allow us to recover damages we have suffered because the state or its citizens made indirect purchases. It was this outrage and frustration that led us to voice our support for legislation to overturn the disastrous effects of Illinois Brick in 1978 and to reaffirm our support for a legislative reversal of Illinois Brick in August 1980.

As Attorney General of Arizona, I appeared before the House Subcommittee on Monopolies in 1977 to urge passage of Illinois Brick remedial legislation, and before your Committee as Governor in 1979. Other Governors and Attorneys General have appeared before the Congress on numerous occasions to urge passage of an Illinois Brick override. Each time, we have been met with opposition -- and each time we have attempted to meet the concerns of opponents to previous proposals. It is my firm belief that the current Illinois Brick proposal is a vastly different solution to the problem of indirect purchasers -- a solution which represents a carefully balanced, narrowly targetted, fair and reasonable approach to returning to federal, state, and local governments the means by which to recover tax dollars wasted as a result of price fixing and bid rigging, while at the same time eliminating the fears that have been raised with respect to previous bills.

Illinois Brick is clearly contrary to the recognized policies underlying the fair and effective enforcement of the antitrust laws. Prior to Illinois Brick, the antitrust damage remedy was founded on the dual objectives of providing compensation to those actually injured and of creating an incentive for the enforcement of the antitrust laws. Illinois Brick has changed these policies, creating a situation where the law is no longer concerned with questions of actual injury and instead gives a windfall to a group some members of which may have actually profited by the unlawful conduct. The Illinois Brick decision, in addition, limited the role of private attorney general to a group that may have affirmative reasons for not instituting suit, and that historically has shown little interest in antitrust enforcement. Prior to the Illinois Brick decision, hundreds of millions of dollars had been recovered on behalf of state and local governments, the United States, and individual consumers, all of whom were indirect purchasers. This is no longer possible because of Illinois Brick, a result contrary to the history and purposes of antitrust enforcement. It is imperative that states be provided with an enforcement tool to stop the waste of tax dollars and the pilferage of state treasuries at a time when governments are under pressure to rein in extensive expenditures, to be accountable and to achieve the maximum benefit from each dollar spent.

Let me assure you, Mr. Chairman, that any fears that this legislation will open the floodgates of litigation are completely unsounded. The legislation creates a very limited class of plaintiffs. S.915, as amended, would only permit suits by injured indirect purchasers in three very limited circumstances -- the U.S. Attorney General may sue to obtain damages where the U.S. was an indirect purchaser, the state Attorneys General could bring suit where the state or its political subdivision was injured by a violation of §1 of the Sherman Act, and finally the state Attorneys General could bring parens patriae suits where consumers they represent have been injured even though these consumers may have been indirect purchasers.

S.915, as amended, further negates any concerns expressed in the past that duplicative recovery might result. This bill clearly eliminates the possibility of duplicative recovery, requiring that the plaintiff demonstrate that no double recovery will result. The possibility of multiple suits by plaintiffs on different levels of the distribution chain is similarly negated, since Attorneys General will be notified of any direct purchaser suits and will be able to intervene in the pending suit rather than instituting separate litigation.

In sum, any fears that a legislative override of Illinois Brick would result in unduly complicated multiple suits have no basis in fact. I, therefore, in the interests of a fundamental national policy of free and open competition, unfettered by collusion and monopoly, urge you to enact S.915 as amended, and return to the states an enforcement tool that will end the waste of tax dollars and the pilferage of state treasuries.

Sincerely,

Bruce Babbitt

Bruce Babbitt
Governor

BB:nsr

Mr. **Leech**. I would also submit a written statement for the record, if I may file it also, of Tom Miller, attorney general of Iowa, in which he has attached a resolution of the Iowa General Assembly urging the passage of S. 915.

[The following was received for the record:]

STATEMENT OF THE HONORABLE WILLIAM M. LEECH, JR., ATTORNEY GENERAL AND REPORTER, STATE OF TENNESSEE AND CHAIRMAN, ANTITRUST COMMITTEE, OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I AM PLEASED TO APPEAR AND TO GIVE TESTIMONY ON THE STATE ATTORNEYS GENERAL'S POSITION ON S. 915 AND AMENDMENTS THERETO, MORE POPULARLY KNOWN AS THE "TAXPAYER ANTITRUST ENFORCEMENT ACT OF 1984." MY REMARKS TODAY ARE IN A REPRESENTATIVE CAPACITY AS CHAIRMAN OF THE ANTITRUST COMMITTEE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, AND AS TENNESSEE'S PRINCIPAL LAW ENFORCEMENT OFFICER IN ANTITRUST MATTERS. ON BEHALF OF ALL ATTORNEYS GENERAL, I WISH TO EXPRESS OUR APPRECIATION FOR THIS COMMITTEE'S WILLINGNESS TO CONSIDER AGAIN A CONGRESSIONAL RESPONSE TO THE SUBSTANTIAL ADVERSE IMPACT OF THE DECISION IN ILLINOIS BRICK CO. v. ILLINOIS, UPON THE STATES, THEIR POLITICAL SUBDIVISIONS, AND THEIR CITIZENRY. MY TESTIMONY TODAY IS A CONTINUATION OF THE EFFORTS OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL WHOSE MEMBERS HAVE APPEARED IN YEARS PAST BEFORE THIS COMMITTEE AND OTHERS, SEEKING THE CONGRESS' HELP ON THIS QUESTION.

AS THE COMMITTEE IS AWARE, IN 1977 THE UNITED STATES SUPREME COURT, IN ILLINOIS BRICK CO. v. STATE OF ILLINOIS, 431 U.S. 720 (1977), HELD THAT EXCEPT IN EXTRAORDINARY CIRCUMSTANCES

AN INDIRECT PURCHASERER COULD NOT SUE TO RECOVER DAMAGES FOR ANTITRUST VIOLATIONS IN FEDERAL COURT UNDER THE CLAYTON ACT. THE PRINCIPAL BASES FOR THE COURT'S HOLDING WERE THE POSSIBILITY OF DUPLICATIVE RECOVERY BY INDIRECT AND DIRECT PURCHASERS FROM THE SAME DEFENDANTS, AND THE POTENTIAL UNMANAGEABILITY OF SUITS BY INDIRECT PURCHASERS. THE PRINCIPAL EFFECT OF THE COURT'S HOLDING WAS TO SUBSTANTIALLY REDUCE, IF NOT ELIMINATE, ANTITRUST ACTIONS BY INDIRECT PURCHASERS TO RECOVER DAMAGES SUFFERED BY REASON OF AN ANTITRUST VIOLATION.

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL IS ONE OF MANY GROUPS THAT HAVE REQUESTED LEGISLATIVE RELIEF FROM THE ADVERSE EFFECTS OF THE ILLINOIS BRICK RULING. THE EARLY LEGISLATIVE PROPOSALS FOR RELIEF WERE BROADLY WORDED AND GENERATED SUBSTANTIAL DEBATE ON WHETHER SUCH PROPOSALS PRESENTED MORE PROBLEMS THAN THEY WOULD SOLVE.

THE PRODUCT OF THIS EXTENDED DEBATE IS A NARROWLY DRAWN BILL, S. 915, THAT WOULD NOW PERMIT ONLY THE UNITED STATES, THE STATES, THEIR POLITICAL SUBDIVISIONS OR NATURAL CITIZENS, BY THEIR ATTORNEYS GENERAL, TO SUE FOR OVERCHARGES IN ANY INSTANCE WHERE THESE GOVERNMENTAL ENTITIES OR THEIR CITIZENS WERE INDIRECT PURCHASERS FROM THE ANTITRUST VIOLATORS. IN ADDITION, THE PROVISIONS OF S. 915 WOULD VIRTUALLY ELIMINATE THE PROSPECTS OF MULTIPLE LIABILITY BY ALLOWING THE DEFENDANTS IN SUCH A SUIT TO PLEAD AFFIRMATIVELY A PASS-ON DEFENSE, AND REQUIRING PLAINTIFFS

IN THESE CASES TO PROVE THAT THEY DID NOT PASS ON ANY PORTION OF THE OVERCHANGE. IN ADDITION, THERE IS A MECHANISM FOR JOINDER OF ANY OTHER INTERESTED OR INDISPENSABLE GOVERNMENT PARTIES AND FOR THE ALLOCATION OF ANY RECOVERIES BETWEEN DIRECT PURCHASERS AND INDIRECT PURCHASERS REPRESENTED BY THE STATES OR THE UNITED STATES.

S. 915, IN THE STATES' JUDGMENT, PROVIDES MECHANISMS THAT WILL SATISFACTORILY ADDRESS THE SUPREME COURT'S ORIGINAL CONCERNS IN THE ILLINOIS BRICK DECISION AS TO THE PROSPECT OF MULTIPLE AND DUPLICATE RECOVERY, AND JUDICIAL UNMANAGEABILITY. IN ADDITION, S. 915 ELIMINATES OTHER CONCERNS ABOUT POTENTIAL ABUSE OF THE ANTITRUST LAWS BY PRIVATE PARTIES AND REPRESENTATION OF THE STATES BY PRIVATE COUNSEL.

AS TO THE DUPLICATIVE RECOVERY ISSUE, THE SUPREME COURT'S CONCERN WAS THAT INDIRECT AS WELL AS DIRECT PURCHASERS WOULD LIKELY SUE THE ANTITRUST VIOLATORS IN SEPARATE ACTIONS. THE STATES OBSERVE THAT EVEN PRIOR TO ILLINOIS BRICK THERE WAS NEVER A REPORTED CASE IN WHICH AN ANTITRUST DEFENDANT WAS SUBJECTED TO MULTIPLE LIABILITY FOR AN ANTITRUST OFFENSE. INDEED, THE LOWER FEDERAL COURTS, WHEN PRESENTED WITH ARGUMENTS ABOUT POTENTIAL DUPLICATIVE RECOVERIES IN THESE CIRCUMSTANCES, OBSERVED THAT SUCH CLAIMS WERE "NOTHING MORE THAN ... A HYPOTHETICAL

QUESTION CONCERNING THE ALLOCATION OF PROVABLE INJURY,"[1] OR WERE DEEMED TO BE "LARGELY ILLUSIORY,"[2] OR SIMPLY A "POSSIBILITY" THAT WAS "TOO DRASTIC A MEASURE" TO DENY THE INJURED PARTY STANDING TO SUE.[3]

IN OUR JUDGMENT, S. 915 SATISFACTORILY ADDRESSES THE DUPLICATIVE RECOVERY FEAR. AS A GENERAL RULE FOR ACTIONS BROUGHT UNDER S. 915, THE STATES WOULD BE ENTITLED TO THE SAME AMOUNT OF DAMAGES AS IF THE DIRECT PURCHASER FROM THE DEFENDANT HAD NOT PASSED ON ALL OF THE OVERCHARGE, WITH CERTAIN IMPORTANT PROVISOS.

FIRST, IF THE DEFENDANT IN THE STATE'S ACTION HAS BEEN PREVIOUSLY SUED BY THE DIRECT PURCHASER AND HAS PAID DAMAGES TO THE DIRECT PURCHASER, THE DEFENDANT WOULD BE ENTITLED, IN EFFECT, TO DEDUCT THE DAMAGES PAID TO THE DIRECT PURCHASER FROM ANY STATE'S DAMAGE AWARD.

SECOND, IF THE DIRECT PURCHASER SUES THE SAME DEFENDANT AGAINST WHOM THE STATE HAS OBTAINED A DAMAGE AWARD, THIS ANTITRUST DEFENDANT GETS A CREDIT AGAINST ANY DIRECT PURCHASER'S JUDGMENT FOR THE AMOUNT OF DAMAGES PAID TO THE STATE.

THIRD, IF THE PROOF IN THE STATE'S ACTION DEMONSTRATED THAT THE STATE DID NOT SUFFER THE FULL AMOUNT OF THE OVERCHARGE,

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[1] State of Washington v. American Pipe & Const. Co., 247 F.Supp. 961, 965 (W.D. Wash. 1967).

[2] In Re: Master Key Antitrust Litigation, 1973, 2 Trade Cases, ¶ 74, 680 at pp. 97, 99.

[3] Boshes v. General Motors, 59 F.R.D. 589, 596 (N.D. Ill. 1973).

THEN THE STATE GETS A JUDGMENT ONLY FOR THE ACTUAL AMOUNT OF THE OVERCHARGE PAID BY THE STATE. THIS AMOUNT IS TREBLED BY OPERATION OF LAW.

FOURTH, IF THE PROOF IN AN ACTION BY THE DIRECT PURCHASER SHOWS THAT THERE WAS NO PASS-ON BY THE DIRECT PURCHASER, S. 915 GIVES THE DEFENDANT PROTECTION AGAINST ANY SUBSEQUENT ACTION BROUGHT BY THE STATE TO RECOVER DAMAGES. IF THERE IS PROOF OF A PASS-ON OF THE OVERCHARGE BY THE DIRECT PURCHASER, THE DIRECT PURCHASER CANNOT RECOVER THE AMOUNT THAT IT PASSED-ON TO THE STATE.

IN A WORD, THERE IS NO DUPLICATIVE RECOVERY UNDER S. 915. IN ANY EVENT, THE DIRECT PURCHASER OR THE STATE HAS TO PROVE THE AMOUNT OF THE PASS-ON, IF THE DEFENDANT PLEADS THE PASS-ON DEFENSE.

AS NOTED, UNDER S. 915, THE DEFENDANT IS ALLOWED TO USE THE PASS-ON CONCEPT AS AN AFFIRMATIVE DEFENSE IN AN ACTION BROUGHT BY THE DIRECT PURCHASER ONLY IF THE ANTITRUST DEFENDANT HAS A FACTUAL BASIS TO BELIEVE THAT THE DIRECT PURCHASER PLAINTIFF PASSED ON ALL OR SOME OF THE AMOUNT OF THE OVERCHARGE TO ANOTHER ENTITY OR PERSON IN THE COMMERCIAL CHAIN. THE DEFENDANT MUST, HOWEVER, PLEAD THIS DEFENSE WITH A REASONABLE FACTUAL DESCRIPTION OF THE EXTENT AND MANNER OF THE PASS-ON. UNDER S. 915, THE DIRECT PURCHASER OR THE STATE WOULD BEAR THE

BURDEN OF PROOF TO PROVE THAT SOME OR ALL OF THE COST WAS NOT PASSED ON BY THE DIRECT PURCHASER.

IF A DEFENDANT PLEADS THIS DEFENSE IN A DIRECT PURCHASER ACTION, ALL STATES ARE REQUIRED TO BE NOTIFIED BY THE DEFENDANT AND MAY ELECT TO INTERVENE IN THE ACTION, IF THE STATE HAS A CLAIM. IF A STATE JOINS THE ACTION, THE AMOUNT OF DAMAGES OWED BY ANY DEFENDANT WOULD THEN BE ALLOCATED AMONG ALL THE PARTY-PLAINTIFFS. THIS PROCEDURE IS AN ADDITIONAL PROTECTION AGAINST THE PROSPECT OF MULTIPLE RECOVERY OF THE TOTAL OVERCHARGE BY THE DIRECT PURCHASER AND INDIRECT PURCHASER IN SEPARATE ACTIONS. INDEED, UNDER S. 915, ONCE A DEFENDANT HAS PAID DAMAGES IN ONE ACTION, THE DEFENDANT IS ENTITLED TO AN ALLOCATION OF ITS PRIOR DAMAGE AWARD AGAINST ANY SUBSEQUENT CLAIM IN ANOTHER SEPARATE LAWSUIT.

AS TO THE MANAGEABILITY ISSUE, THE STATES WOULD OBSERVE THAT THE LOWER FEDERAL COURTS HAVE AMPLY DEMONSTRATED THEIR ABILITIES TO HANDLE ANTITRUST LITIGATION INVOLVING MULTI-LEVEL CHAINS OF DISTRIBUTION.[4] IN ADDITION, S. 915 DRASTICALLY LIMITS THE CLASS OF ELIGIBLE PLAINTIFFS AND TYPES OF OFFENSES FOR INDIRECT PURCHASER ACTIONS. UNDER S. 915, ONLY GOVERNMENTAL ENTITIES REPRESENTED BY GOVERNMENT COUNSEL MAY BRING AN ACTION IN

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[4] In Re: Gypsum Antitrust Cases No. 46414 (N.D. Cal. 1974); State of West Virginia v. Chas. Pfizer & Co., 314 F.Supp 710 (S.D. N.Y. 1970) aff'd 440 F.2d 1079 (2d Cir. 1971); Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

THE SITUATION WHERE THE UNITED STATES, A STATE, OR ITS POLITICAL SUBDIVISIONS OR ITS NATURAL CITIZENS IS AN INDIRECT PURCHSER WHO IS INJURED BY REASON OF CERTAIN ANTITRUST OFFENSES. IT IS NOTEWORTHY THAT S. 915 ALSO LIMITS THE TYPE OF ANTITRUST ACTIONS THAT THE GOVERNMENTS, AS INDIRECT PURCHASERS, MAY BRING TO SHERMAN ACT OFFENSES. CASES BROUGHT BY THE STATES UNDER SECTION 1 OF THE SHERMAN ACT ARE NORMALLY FOR *PER SE* OFFENSES, SUCH AS BID-RIGGING ON PUBLIC CONTRACTS, AND PRICE-FIXING.

IN *ILLINOIS BRICK*, THE SUPREME COURT WAS CONFRONTED WITH FASHIONING RULES TO GOVERN ALL ANTITRUST PLAINTIFFS, PUBLIC AND PRIVATE, AND ALL TYPES OF ANTITRUST OFFENSES. GIVEN THE SCOPE OF ITS RULING, THE COURT'S CONCERNS ABOUT MANAGEABILITY AND FURTHER BURDENS ON THE JUDICIARY WERE UNDERSTANDABLE. HOWEVER, S. 915 REPRESENTS A STATUTORY REMEDY FOR A VERY NARROWLY DEFINED GROUP OF PLAINTIFFS AND FOR SPECIFIC TYPES OF ANTITRUST OFFENSES. IN A WORD, S. 915 DOES NOT REPRESENT ANYWHERE NEAR THE CONCERNS THAT WERE BEFORE THE SUPREME COURT IN *ILLINOIS BRICK*.

ASSUMING THE VALIDITY OF THESE THEORETICAL FEARS OF DUPLICATIVE RECOVERY AND UNMANAGEABILITY, THE STATES SUBMIT THAT IT IS HIGHLY INEQUITABLE AND INJURIOUS TO THE PUBLIC WELFARE TO EFFECTIVELY BAR THE PUBLIC ENTITIES FROM RECOVERY FOR REAL AND SUBSTANTIAL INJURIES CAUSED BY ANTITRUST VIOLATIONS. THE DRASTIC IMPACT OF THE *ILLINOIS BRICK* DECISION UPON THE STATES HAS BEEN DOCUMENTED BEFORE THIS COMMITTEE AND OTHERS ON PRIOR OCCASIONS BY

MY COLLEAGUES, BUT PERHAPS SOME RECENT EXAMPLES OF THIS ADVERSE IMPACT WOULD BE HELPFUL.

IN A MULTI-DISTRICT CASE BROUGHT BY SEVERAL STATES ALLEGING PRICE FIXING ACTIVITIES BY SEVERAL MAJOR OIL COMPANIES, THE COURT HELD THAT THE ILLINOIS BRICK DECISION BARRED THE OVERWHELMING MAJORITY OF THE STATES' CLAIMS.[5] IN A PENDING MULTI-DISTRICT CASE,[6] SEVERAL MANUFACTURERS OF ART MATERIALS THAT PLED GUILTY TO PRICE FIXING IN FEDERAL COURT CRIMINAL PROCEEDINGS MAY AVOID THEIR CIVIL LIABILITIES FOR DAMAGES TO SEVERAL PUBLIC ENTITIES, SUCH AS STATES AND LOCAL SCHOOL DISTRICTS, BY REASON OF THE ILLINOIS BRICK DECISION.

ALSO IMPORTANT IS THE LITIGATION THAT HAS NOT BEEN FILED AND THE INVESTIGATIONS THAT HAVE BEEN CLOSED BY REASON OF THE ILLINOIS BRICK HOLDING. OF THE RELATIVELY FEW CASES THAT FALL WITHIN THE EXCEPTIONS TO THE ILLINOIS BRICK HOLDING, EVEN THOSE CASES REQUIRE AN EXTENSIVE FACTUAL ANALYSIS AND THE COMMITTMENT OF EXTENSIVE RESOURCES WITH HIGHLY UNCERTAIN OUTCOMES. THERE IS EVERY REASON TO BELIEVE, HOWEVER, THAT STATES CONTINUE TO BE PLAGUED BY ANTITRUST OFFENSES THAT ADVERSELY IMPACT THE PUBLIC TREASURY. THE MOST NOTABLE EXAMPLES ARE THE HIGHWAY BID-RIGGING CASES THAT ARE VIRTUALLY NATIONWIDE IN SCOPE.

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[5] In Re: Coordinated Pre-Trial Proceedings and Petroleum Products Antitrust Litigation, 1982-83 Trade Cas, ¶ 65,028 (9th Cir. 1982).

[6] In Re: Art Materials Antitrust Litigation, MDL Docket No. 436.

THE STATE AND ITS CITIZENS ARE OFTEN INDIRECT PURCHASERS PARTICULARLY IN THE AREA OF INDUSTRIAL PRODUCTS AND CONSUMERS' GOODS. MANY STATES, IN THE PERFORMANCE OF THEIR GOVERNMENTAL FUNCTIONS, EXPEND HUGH SUMS OF TAXPAYERS' MONIES IN CAPITAL IMPROVEMENTS AND CONSTRUCTION PROJECTS. INDEED, THE ILLINOIS BRICK DECISION, ITSELF, INVOLVED A PUBLIC CONSTRUCTION PROJECT. ANTITRUST OFFENSES IN THE SALES OF GOODS FOR THE PERFORMANCE OF THESE LARGE GOVERNMENT CONTRACTS CONSTITUTE GRAND THEFT AGAINST THE TAXPAYERS OF OUR STATES, FOR WHICH WE HAVE NO EFFECTIVE LEGAL RECOURSE TO RECOVER OVERCHARGES BECAUSE OF THE ILLINOIS BRICK HOLDING. THIS LEGAL BARRIER TO RECOVER PUBLIC FUNDS EXISTS AT A TIME WHEN THERE ARE DWINDLING STATE RESOURCES AND SUBSTANTIAL PUBLIC NEEDS FOR LIMITED PUBLIC FUNDS.

CONSUMERS ARE ALSO OFTEN INDIRECT PURCHASERS IN THE MARKETPLACE, PARTICULARLY FOR MANUFACTURED GOODS THAT ARE SOLD IN A MULTI-TIERED MARKET STRUCTURE. IT WOULD FURTHER FRUSTRATE THE PURPOSES OF THE HART-SCOTT-RODINO ACT TO ALLOW THE ILLINOIS BRICK DECISION TO STAND AS A BAR TO MOST CONSUMER ANTITRUST ACTIONS. WHETHER ECONOMIC CONDITIONS ARE INFLATIONARY OR RESTRICTED, THE CONSUMER IS INVARIABLY INJURED BY ANTITRUST OFFENSES.

LEGAL DISTINCTIONS BETWEEN ACTIONS BROUGHT BY THE STATES AS OPPOSED TO ACTIONS BROUGHT BY PRIVATE COMMERCIAL ENTITY PLAINTIFFS UNDER THE FEDERAL ANTITRUST LAWS IS WELL ESTABLISHED. THE SUPREME COURT HAS RECOGNIZED THAT ANTITRUST OFFENSES AGAINST

THE STATE, ITS POLITICAL SUBDIVISIONS, AND ITS CITIZENS WERE MATTERS OF "GRAVE PUBLIC CONCERN."[7] THE PASSAGE BY THE CONGRESS OF THE HART-SCOTT-RODINO ACT, AUTHORIZING STATE ATTORNEYS GENERAL TO REPRESENT NATURAL CITIZENS, WAS A CONGRESSIONAL RESPONSE TO A COMPELLING, SPECIAL NEED TO PROTECT THE STATES' CITIZENS FROM BEING VICTIMIZED BY ANTITRUST OFFENSES.

IN PARTICULAR, THE AMERICAN ENTERPRISE INSTITUTE, A PUBLIC POLICY RESEARCH ORGANIZATION THAT HAS GIVEN EXTENSIVE ANALYSIS TO THE VARIOUS LEGISLATIVE PROPOSALS TO OVERRULE THE _ILLINOIS BRICK_ DECISIONS, NOTED THAT

> THIS SUGGESTION OF SPECIAL TREATMENT FOR GOVERNMENTAL BODIES WHICH ARE INDIRECT PURCHASERS ... HAS MERIT IN THAT THE PURCHASES INVOLVED WILL BE LARGE ENOUGH TO MAKE LITIGATION WORTH WHILE. THE SAVINGS TO THE TAX PAYERS COULD BE SUBSTANTIAL.[8]

WE URGE THE COMMITTEE TO GIVE FAVORABLE CONSIDERATION TO S. 915, AND ASK FOR EACH MEMBER'S SUPPORT IF S. 915 COMES TO THE FLOOR OF THE SENATE FOR DEBATE.

I APPRECIATE THE COMMITTEE'S CONSIDERATION OF MY REMARKS I WILL BE DELIGHTED TO TRY TO ANSWER ANY QUESTIONS THAT ANY MEMBER OF THE COMMITTEE MAY HAVE.

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[7] _Georgia v. Penn. R.R. Co._, 324 U.S. 439, 451 (1945).

[8] "Expanding the Right to Sue for Antitrust Violations, Proposals to overrule the _Illinois Brick_ legislation." American Enterprise Institute, at p. 23.

[illegible] Calendar No.

Purpose:

IN THE SENATE OF THE UNITED STATES— 98th Cong., 1st Sess.

S. 915

H.R. (or Treaty SHORT TITLE)

(title) "The Taxpayer Antitrust Enforcement Act of 1983"

( ) Referred to the Committee on
and ordered to be printed

( ) Ordered to lie on the table and to be printed

INTENDED to be proposed by Mr. Gorton for himself and others

Viz:

Strike all after the Enacting Clause and insert in lieu thereof, the following:

"Sec. 1. Section 4 of the Clayton Act (15 U.S.C. 15) is amended by adding at the end thereof a new section 4(I) to read as follows;

Sec. 4(I)(a)(1) An action brought by the Attorney General of a State on behalf of the State or a political subdivision thereof, pursuant to section 4 of this Act to secure monetary relief as provided for injury sustained by such State or political subdivision by reason of any violation of section 1 of this title, by the United States pursuant to section 4(A) of this Act for injury sustained by the United States by reason of any violation of section 1 of this title, or by an Attorney General pursuant to Section 4(C) of this Act, may be maintained when such State, political subdivision, the United States or such natural persons on whose behalf the action is brought has or have purchased indirectly from the defendant: Provided, that, nothing in this section shall preclude any existing right of any State, political subdivision, the United States, or an Attorney General on behalf of natural persons, to sue under sections 4, 4(A) or 4(C).

"(2) In any action arising out of indirect purchases by the United States, any State or political subdivision thereof or by any natural person, permitted by paragraph (a)(1) of this section, the court shall award to the United States, State or political subdivision, threefold that amount which constitutes the damage which would have been sustained by any direct purchaser with respect to purchases, directly or indirectly, by the United States, State or political subdivision or natural persons, had the damage not been passed on by the direct purchaser to any other person; Provided, however, there shall be excluded from the amount of monetary relief awarded in such action any amount of monetary relief which (1) duplicates amounts which have been awarded for the same injury to another person who has proven, in fact, such injury in a previous action in which the defendant has asserted a defense under section 4(1)(b) against said other person and in which notice has been properly given pursuant to said section, or (2) is properly allocable to any person who purchased directly from the defendant, upon proof, in fact, in such action that the damage was not passed on by such person. The court shall also award to the Attorney General the cost of suit, including a reasonable attorney's fee.

"Section 4(1)(b)(1) In any action brought under section 4 of this Act, the defendant shall be entitled to allege, as a partial or complete defense, that some or all of what would otherwise constitute plaintiff's damages were passed on by plaintiff to any other person and that with respect to such damages an action may be brought by the United States or an Attorney General of a State pursuant to paragraph (a)(1) of this section. The defendant shall set forth, in asserting such defense, with as much particularity as is reasonable, the identity of those to whom the the defendant asserts the plaintiff has passed on, directly or indirectly, some or all of plaintiffs damages.

"(2) In the event that a defendant has pleaded the defense permitted by paragraph 1 of this subsection, the plaintiff shall have the burden of proving that all or part of the damages, as the case may be, have not been passed on by the plaintiff.

"(3) In the event that the defendant asserts the defense permitted by paragraph 1 of this subsection, the defendant shall provide written notice, by certified or registered mail, return receipt requested, to any Attorney General who may be entitled to maintain an action against the defendant under paragraph (a)(1) of this section.

"(4) Upon receipt of such notice, the Attorney General of the United States, or of any State, in addition to any other remedy, may, upon motion made within one hundred and twenty (120) days, intervene in such action and shall be joined pursuant to Rule 24 of the Federal Rules of Civil Procedure with respect to any issue arising under paragraph (1) of this subsection."

"(5) In any case in which the defendant has asserted a defense pursuant to this subsection and in which the court awards monetary relief, there shall be excluded from the amount of monetary relief awarded any amount which (1) duplicates amounts which have been awarded for the same injury to another person who has proven, in fact, such injury in a previous action, or (2) is properly allocable to the United States, any state or political subdivision or any natural person based on the application of this subsection to any action. "

"Section 2. This Act may be cited as "The Taxpayer Antitrust Enforcement Act of 1984."

STATEMENT OF
THOMAS J. MILLER
ATTORNEY GENERAL OF IOWA
BEFORE SENATE JUDICIARY COMMITTEE

Mr. Chairman and members of the Committee: Thank you for the opportunity to present my views to your committee on this important piece of legislation. It has been seven years since the United States Supreme Court barred indirect purchasers from suing price fixers in Illinois v. Illinois Brick Co., 431 U.S. 720 (1977). Since that decision, states have paid millions of dollars in taxpayers' money for overcharges which may have been the product of illegal price fixing conspiracies by manufacturers. However, the states have been unable to sue to prove these conspiracies and recover the overcharges because their purchases were through independent middlemen, even though in most cases, those middlemen undoubtedly passed on the manufacturers' overcharges.

In addition to this flagrant waste of tax dollars, state attorneys general are unable to utilize fully and effectively the parens patriae powers you gave us in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. section 15c), to use on behalf of private consumers who have been overcharged by price fixing conspiracies, but who are indirect purchasers.

In 1979, Senator Danforth described twelve cases where states were precluded by the Illinois Brick decision from either suing, or at least proving the total extent of their damages [Congressional Record, June 9, 1979, Vol. 125, No. 73]. Predictably, since that time other such cases have occurred. For example, four major manufacturers of art materials and their officers were convicted of federal criminal antitrust charges and settled federal civil antitrust litigation in connection with a conspiracy to fix the price of crayons and other art materials. The Federal Trade Commission did force these four defendants to disgorge a total of 1.5 million dollars of their illegal profits, of which the state of Iowa received approximately $20,000.

However, many states, including Iowa, felt that this amount did not fairly reflect the vast overcharges which may have occurred due to the actions of these defendants. Twelve states have filed civil damage suits as large purchasers of art materials, but will certainly be facing reduced judgments since many of their purchases were from independent middlemen, who one can be sure, did not simply absorb the increased prices from their manufacturers. In addition, no state has filed a parens patriae suit on behalf of the millions of private consumers of art materials, since they are clearly indirect purchasers. The state of Iowa was forced to file a state court action seeking a civil penalty, which has a maximum lid of $150,000.

As you can see, the problems caused by Illinois Brick are unfair to the citizens of this country, both as taxpayers and as consumers. And the problems are not going to go away. Indeed, as long as that decision is allowed to stand unchanged, one great tool in the arsenal of antitrust enforcement -- the civil lawsuit -- is so blunted as to be of little practical value. Concomitantly, the deterrent value of these laws is reduced.

Since corrective legislation was first introduced seven years ago, state attorneys general, consumer groups and small business groups have been pitted against "corporate America" and its powerful associations, such as the Business Roundtable, in attempting to have Congress revitalize what it intended when it passed the Clayton Act over 70 years ago by giving private parties, including states, the right to sue under the Sherman Act. That intent was then, and should be today, to have the most effective enforcement of the antitrust laws possible, through a combination of federal prosecutions by the government and civil actions by aggrieved consumers, who have the incentive to sue to force disgorgement of unlawful profits.

I might point out that every year since 1977 the National Association of Attorneys General has passed a resolution urging Congress to overturn the Illinois Brick decision. This year, the General Assemblies of several states, including Iowa, have passed concurrent resolutions urging its repeal. I have included a copy of the Iowa resolution for your information.

The Business Roundtable and other large corporations opposed to this legislation raise the specter of state attorneys general running gleefully to the federal courthouse with stacks of unmeritorious antitrust complaints in their hands in order to extort legitimate profits from innocent companies if this bill is passed. That did not happen prior to Illinois Brick. I challenge opponents of this legislation to show this Committee that the prospect of frivolous litigation is serious enough that the largest class of victims of antitrust overcharges should be precluded from being compensated for their damages by antitrust violators. Furthermore, I know of no state attorney general who has the time or resources to engage in such frivolous litigation. Most often, these private suits to collect damages for the overcharges are based on federal prosecutions which have already established the defendants' liability. Of course, there may be isolated instances of unmeritorious litigation, but that can happen in any type of litigation. The answer is not to preclude all suits in order to stop the few that lack merit, but rather to enforce the Federal Rules of Civil Procedure which can take care of those few instances.

S. 915, as amended, is an ideal solution. State attorneys general traditionally are the legal representatives of both their states and the citizens of their states in a parens patriae sense. By limiting standing to the United States and state attorneys general, S. 915 will prevent the anticipated "release of the floodgates" of litigation some fear, yet will allow those victims who are hit the hardest by unlawful price fixing conspiracies -- the ultimate consumer -- to be compensated. It will assure that those violating the antitrust laws will be forced to give up their unlawful profits by giving the right to sue to the person with the most incentive -- the victim. The middleman, who now has the right to sue as a direct purchaser from the price fixing manufacturer, has a variety of reasons not to sue, such as fear of retaliation by the manufacturer upon whom he depends for his business and the fact he probably passed on the overcharge anyway.

S. 915, as amended, further alleviates one of the concerns the Supreme Court expressed in Illinois Brick. Duplicative recovery by different plaintiffs, which was possible prior to Illinois Brick, is clearly eliminated and the burden is placed on the plaintiff to show there will not be such a double recovery. The possibility of multiple suits by plaintiffs on different levels of the distribution chain is also lessened by requiring that the attorneys general be notified of suits of direct purchasing private plaintiffs who have sued for the price fixing conspiracy, so that they may intervene in the pending lawsuit, rather than filing separately against the same defendants.

S. 915 as amended is a fair and balanced approach. The important public policies of ensuring enforcement of the antitrust laws and recovering public and private monies wasted by antitrust violations are carefully balanced against the need to ensure that defendants are not forced to give up more than the treble damages which can be assessed against them.

I urge you to pass S. 915, as amended.

SENATE CONCURRENT RESOLUTION 114

BY DOYLE

(AS AMENDED AND ADOPTED APRIL 12, 1984)

RECEIVED
1984 APR 26 AM 9:27
ATTORNEY GENERAL
ANTITRUST DIV.

A Senate Concurrent Resolution relating to the [illegible] Antitrust Enforcement Act of 1983.

WHEREAS, since the 1977 decision by the United States Supreme Court in Illinois Brick v. Illinois, 431 U.S. 720 (1977), in which the court held that only direct purchasers may recover for damages resulting from antitrust violations, state and local governments have been left without recourse against price-fixers and bid-riggers with whom they have not dealt directly; AND

WHEREAS, state and local governments make over ninety percent of their purchases for goods and services indirectly through middlemen; and

WHEREAS, millions of taxpayer dollars have been lost in the form of illegally inflated prices passed on to governmental entities under such contracts; and

WHEREAS, the "Taxpayer Antitrust Enforcement Act of 1983" (S. 915), cosponsored by Senators Gorton, Rudman, and Danforth, among others, authorizes the United States Attorney General and the state attorneys general to prosecute such antitrust violations; NOW THEREFORE,

BE IT RESOLVED BY THE SENATE, THE HOUSE CONCURRING, That all concerned be apprised of the necessity of eliminating the void in antitrust enforcement, which resulted from the *Illinois Brick v. Illinois* decision, by the enactment of S. 915; and

BE IT FURTHER RESOLVED, That copies of this resolution be immediately transmitted to the Honorable Ronald Reagan, President of the United States, the Attorney General of the United States, the President of the United States Senate, the Speaker of the House of Representatives, and each member of congress from the state of Iowa.

Mr. LEECH. The bill itself, we think, provides the machinery, if enacted, to enable the States to actively pursue those people who are now engaged in passing on and in fixing prices which are oppressive to the taxpayers within our States.

I would be glad to attempt to answer any questions which you might have.

The CHAIRMAN. Attorney General Leech, on account of time constraints, would it suit you if we sent you some questions that you could answer for the record?

Mr. LEECH. Yes, sir; we would be glad to, and answer them in detail. If I may echo the sentiments of the distinguished Senator Slade Gorton, we too intend to continue pursuing some sort of remedial legislation that would assist the States in rectifying some of the indirect purchaser problems of bid-rigging and price-fixing.

The CHAIRMAN. Thank you very much, and thank you for your presence here, too. You are president of the attorneys general association, are you not?

Mr. LEECH. No, Senator. I am the chairman of the antitrust committee for the National Association of Attorneys General.

The CHAIRMAN. I see. Thank you very much.

Mr. LEECH. Yes, sir.

The CHAIRMAN. All right. Our next witness is Kimba Wood from LeBouf, Lamb, Leiby & MacRae in New York, on behalf of the section on antitrust law, American Bar Association.

Ms. Wood, we are glad to have you with us. Would you like for your entire statement to go in the record and then take about 5 minutes to summarize it?

STATEMENT OF KIMBA WOOD, OF LeBOUF, LAMB, LEIBY & MacRAE, NEW YORK, NY, ON BEHALF OF THE SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION

Ms. Wood. That would be fine, Mr. Chairman.

The Chairman. That will be done. You may proceed, Ms. Wood.

Ms. Wood. Thank you. I am chairman of the American Bar Association Committee on Civil Practice and Procedure, and in that capacity I appreciate this opportunity to appear before you today to express the views of the section of antitrust law regarding S. 915.

The ABA's section of antitrust law, which consists of over 13,000 lawyers, most of whom have spent much of their professional lives practicing antitrust law, have studied in depth the issues raised by S. 915.

We have submitted to you our detailed report on the bill and, in particular, the support for our conclusions that the bill will have a detrimental effect on the enforcement of antitrust law.

I would like to emphasize a few critical points at which our assumptions and conclusions differ markedly from those of the proponents of this legislation.

First, the complexity introduced into antitrust litigation by permitting indirect purchasers to sue for damages is not lessened materially by allowing only State attorneys general the right to sue on behalf of individual consumers who purchase indirectly.

The calculation of who, within each chain of distribution, absorbed what part of each defendant's overcharge will still generally have to be shown for hundreds of thousands of transactions, and thus will complicate and prolong antitrust litigation, and can undermine its effective as a deterrent to antitrust violators.

[Senator Grassley assumed the chair.]

Ms. Wood. Second, we disagree with the assumption of the bill's sponsors that direct purchasers will often not sue because of the fear that they will disrupt their supplier relationships or because they suffered little or no damage when they passed on the overcharge.

Because there are almost no statistics either to support or to refute this assumption, the ABA section of antitrust law conducted a survey which is described in our report, the results of which demonstrate that direct purchasers do sue in sufficient numbers to deter antitrust violations.

We found that for the period we studied, which was 1975 through 1982, direct purchaser suits followed at least 78 percent of the Department of Justice antitrust cases filed during those years, excluding highway construction cases where those harmed are usually Government purchasers, and excluding cases for which follow-on litigation data was not available.

We note that passage of this bill would generally dilute the recoveries of direct purchasers and diminish their interest in suing.

Third, we are doubtful that the sponsors' goal of compensating injured consumers will be realized in many cases if this bill is enacted. Even if consumers are able to get over the hurdle of tracing the overcharge absorption through the hundreds or thousands of transactions at issue, we are concerned that many consumers will have no proof of purchase or, where they have proof of purchase, the cost of checking their claims and distributing the recovery may well exceed the funds available for distribution to the consumers.

In sum, we believe that the present system is effective in furthering the goals that you espouse, and that passage of this bill would undermine that effectiveness.

Thank you for the opportunity to appear and I would be happy to answer now or in writing later any questions you may have.

Senator **GRASSLEY**. At this point let me say that I am Senator Grassley and I am taking over as Senator Thurmond has responsibilities elsewhere as President pro tempore of the Senate.

I also wish to make an announcement on behalf of Senator Metzenbaum, it is also applicable to everybody and it follows right on where you left off. Senators may submit questions in writing.

So I would ask the panels to be prepared to answer questions in writing and the record be held open for a substantial length of time to permit that.

I want to thank you very much.

Ms. **WOOD**. Thank you.

Senator **GRASSLEY**. Thank you very much.

[Prepared statement follows:]

SUPPLEMENTAL REPORT OF THE SECTION OF ANTITRUST LAW OF THE AMERICAN BAR ASSOCIATION ON PROPOSED LEGISLATION TO REPEAL OR MODIFY *ILLINOIS BRICK*

These views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and should not be construed as representing the position of the ABA.

I. INTRODUCTION.

The Report that follows was prepared by members of the Section of Antitrust Law of the American Bar Association. It is submitted as a supplement to a Report prepared by members of the Section in July of 1983 which evaluated two bills, H.R. 2244 and S. 915, which were introduced in the last session of Congress to override the decisions of the United States Supreme Court in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and in *Illinois Brick Co*. v. *Illinois*, 431 U.S. 720 (1977). The 1983 Report recommended that the Section of Antitrust Law oppose both H.R. 2244 and S. 915 because neither provided appropriate mechanisms for dealing with the practical problems which would be created by a repeal of *Illinois Brick* and *Hanover Shoe*. The Section Council adopted that recommendation in August of 1983.

The Section of Antitrust Law has recently learned that Senator Slade Gorton plans to introduce a new bill to overturn the *Illinois Brick* and *Hanover Shoe* decisions. This Supplemental Report contains an evaluation of Senator Gorton's new proposal. The Report takes as its starting point the 1983 Report and does not repeat the historical information which that Report contained concerning *Illinois Brick* and *Hanover Shoe* and the effects which those rulings have had on private antitrust enforcement. This Report is limited solely to an evaluation of Senator Gorton's new *Illinois Brick* proposal.

II. THE GORTON PROPOSAL.

Senator Gorton's new bill, a copy of which is attached, is similar to S. 915 and H.R. 2244 in one fundamental respect. Like those bills, the Gorton Proposal provides only a limited repealer of Illinois Brick. It repeals Illinois Brick only to the extent of permitting suits by:

(a) The United States Attorney General under section 4a of the Clayton Act for violations of section 1 of the Sherman Act;

(b) State attorneys general on behalf of states or their political subdivisions under section 4 of the Clayton Act for violations of section 1 of the Sherman Act; and

(c) State attorneys general as *parens patriae* under section 4C of the Clayton Act.[1]

In addition, the Proposal does not reverse Illinois Brick to permit intermediate purchasers of a price fixed product (purchasers who fall between the direct and ultimate purchaser) to recover for any injury which they may have sustained.

The Hanover Shoe repealer contained in the Gorton Proposal is somewhat different from the repealers contained in H.R. 2244 and S. 915 in that it does not limit assertion of the passing-on defense to cases in which there is a risk of duplicative liability. Last year's bills both contained such limitations.[2]

Beyond the basic provisions repealing Illinois Brick and Hanover Shoe, the Gorton Proposal contains a number of dramatic innovations which require careful examination. These new approaches to the Illinois Brick problem include:

(a) Creating a rebuttable presumption that 100% of an overcharge is passed on to the ultimate purchasers of the price fixed product;

(b) Shifting the burden of proof on the passing-on issue from indirect purchasers to direct purchasers;

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[1] There is no provision in the Gorton Proposal limiting its Illinois Brick repealer to price fixing or *per se* violations.

[2] Another difference between the Hanover Shoe provisions contained in the Gorton Proposal and in S. 915 and H.R. 2244 is that the Gorton Proposal permits defendants to plead the passing-on defense only in actions brought under § 4 of the Clayton Act. S. 915 and H.R. 2244 permitted a defendant to plead passing-on in actions brought under §§ 4, 4a and 4C of the Clayton Act.

(c) Collaterally estopping plaintiffs (whether direct or indirect purchasers) from recovering damages awarded for the same violation in another lawsuit, even though the estopped plaintiff was not a party to that suit; and

(d) Subtracting from a direct purchaser's treble damage recovery any damages which are properly allocable to indirect purchasers who could be represented in an attorney general suit, even if such a suit is never brought.

These features of the Gorton Proposal represent significant modifications to bills which have been introduced in the past to overturn Illinois Brick and Hanover Shoe. In effect, they make the United States and state attorneys general favored antitrust plaintiffs at the expense of direct purchaser plaintiffs. The Proposal does this by making it easier for plaintiffs to recover in attorney general treble damage suits while simultaneously impairing the ability of direct purchasers to recover for the same antitrust violations. The Gorton Proposal thus tends to reverse the relative positions of direct purchasers and ultimate consumers in the scheme of antitrust enforcement. Private plaintiffs, who are now the primary enforcers of the treble damage remedy, will be supplanted to an extent by attorneys general, who today have a limited role in antitrust enforcement. This directly contravenes the rationale of Hanover Shoe, that direct purchasers will enforce the antitrust laws more effectively, with less judicial cost, than any subsequent purchaser in the chain of distribution.

The implications which this role reversal may have on private antitrust litigation and enforcement can be expected to be quite extensive.

III. IMPLICATIONS OF THE GORTON PROPOSAL.

The 1983 Report of the Section of Antitrust Law analyzed S. 915 and H.R. 2244 to assess their probable impact on:

(a) The complexity and manageability of treble damage litigation;

(b) The twin antitrust goals of deterrence and compensation;

(c) The problems of multiple liability and inconsistent judgments; and

(d) The continued viability of the class action as a vehicle for private antitrust enforcement.

The implications which the Gorton proposal has in each of these areas of concern are addressed below.

A. COMPLEXITY AND MANAGEABILITY OF ANTITRUST LITIGATION.

The most serious criticism of S. 915 and H.R. 2244 that was contained in the 1983 Report was the failure of either bill to "address the Supreme Court's concern that tracing the absorption of overcharges through the chain of distribution would render antitrust actions so complex and costly that their effectiveness would be hindered." Section of Antitrust Law Report at 23. The Report concluded that it was vital for any bill that modified the direct purchaser rule to provide a method to ensure that antitrust suits involving claims of indirect purchasers be kept manageable. Without such a mechanism, the Report noted, treble damage litigation would become exceedingly complex and some cases would be rendered untriable as the courts and the parties struggled to recreate a series of economic transactions involving the price-fixed goods. In addition, the Report expressed deep concern that the addition to antitrust damage suits of indirect purchaser plaintiffs -- even if limited to indirect purchasers who could be represened by attorneys general -- would result in such a proliferation of parties in those suits that large damage actions could be rendered uncontrollable and untriable. The Gorton Proposal contains a partial answer to this criticism. It provides a mechanism which eliminates, to a great extent, the need to trace illegal overcharges through the chain of distribution. It does not, however, minimize the related problems of manageability created by the addition of a new group of antitrust plaintiffs any more than did S. 915 and H.R. 2244.

The Gorton Proposal addresses the tracing problem by raising a presumption that the entire amount of the overcharge was passed on to ultimate consumers or state purchasers and by placing the burden on direct purchaser plaintiffs to prove the contrary. The presumption does not, however, eliminate the need to litigate the passing-on question and does not alleviate the manageability problems created by introducing a group of those indirect purchasers into antitrust damage cases. Consequently, the Gorton Proposal is subject to most of the objections relating to unmanageability and complexity discussed in the earlier Report or the Section of Antitrust Law.

To appreciate the full impact which the Gorton Proposal has on the complexity and manageability of treble damage litigation, it is necessary to examine the three different types of cases in which the Proposal's presumption of ultimate purchaser damage will be relevant. The examination shows that the presumption will have mixed effects when compared with S. 915 and H.R. 2244. In some instances, it will reduce complexity substantially. In others it will increase complexity. While it appears that the presumption of ultimate purchaser damage will generate a net increase in litigation complexity, it also appears that the presumption will, in some cases, eliminate some of the more severe trial management problems which some observers fear will make certain treble damage cases too complex to try. However, the presumption does not provide a complete solution to the manageability problem.

1. Suit by an Attorney General Only.

In comparison to S. 915 and H.R. 2244, the Gorton Proposal makes its greatest contribution to the simplification of treble damage litigation in the situation where an attorney general sues to recover for an antitrust violation and no action is brought by direct purchasers to recover for the same antitrust violation. Under S. 915 and H.R. 2244, it appeared that in this type of case it would be necessary for the attorney general to trace the alleged overcharge through the entire chain of distribution in order to establish both fact and amount of damage. The Gorton Proposal eliminates this daunting task completely by creating a rebuttable presumption that the purchasers represented by the attorney general absorbed 100% of the alleged overcharge, whether or not those purchasers actually absorbed any portion of the overcharge at all. Significantly, the Gorton Proposal does not permit a defendant to rebut this presumption (i.e., a defendant cannot defend against an attorney general suit on the ground that direct purchasers absorbed the overcharge, where no direct purchaser has sued). Consequently, in cases where only the attorney general sues, no issue of passing-on will be litigated and the attorney general will recover the entire amount of the overcharge automatically. In effect, the attorney general will stand in the same shoes a direct purchaser stands in today.

2. Competing Suits by an Attorney General and Direct Purchasers for the Same Antitrust Violation.

The Gorton Proposal also tends to simplify, to an extent, some of the problems of proof associated with the passing-on question where both an attorney general and direct purchaser sue to recover the same overcharge, as compared with the problems of proof associated with S. 915 and H.R. 2244. The Gorton Proposal does not require that the attorney general trace the overcharge through intermediate purchasers to the ultimate purchaser. It is only necessary to determine how much of the overcharge, if any, was absorbed by the first purchaser and how much was passed on when the first purchaser resold the product. Under the Gorton Proposal the direct purchaser will recover for that portion of the overcharge which he absorbed and the attorney general will recover the balance.

While the Gorton Proposal reduces the number of transactions in the chain of distribution which must be reconstructed to measure the amount of the overcharge which is passed on, it does not simplify the practical problems of proof involved in reconstructing each individual sales transaction within the chain of distribution. The Proposal's simplifying effect comes entirely from its elimination of the need to trace the overcharge beyond the direct purchaser's sale to his customer. Thus, in the situation where both an attorney general and a direct purchaser compete to recover the same overcharge, the problem of reconstructing an entire series of transactions is avoided, to an extent, but the proof problems involved in reconstructing a smaller number of sales transactions remains.

Despite the simplifying effect which the Gorton Proposal can be expected to have in cases of this type, when compared with S. 915 and H.R. 2244, these suits may still be rendered unmanageable by massive amounts of proof which will be required to try the passing-on question. For example, in a case where there are many direct purchasers, each of whom resells to many downstream purchasers, the passing-on issue will still require that the court and the parties reconstruct a large number of economic transactions between the direct and the downstream purchasers.[3] The proof problems will be compounded in cases where direct purchasers have resold products which are distributed in different states. In such cases, direct purchasers -- if they are to protect their treble damage recovery -- will need to trace their sales along the entire chain of distribution to determine what portion of their sales went to ultimate consumers in the plaintiff state and what portion went to consumers in non-plaintiff states. This will require extensive discovery of downstream purchasers, who are not permitted to recover damages under the Proposal, and will force the courts and litigants to spend significant amounts of trial time tracing sales of the price fixed product. Thus, even with the aid of the simplifying presumptions contained in the Gorton Proposal, the remaining passing-on issues may require the reconstruction of a large number of economic transactions which will be too cumbersome to accomplish in a trial format.

3. Suit by a Direct Purchaser Only.

Like S. 915 and H.R. 2244, the Gorton Proposal contributes to the problem of complexity and unmanageability in the situation where a direct purchaser sues to recover an illegal overcharge and no competing attorney general action is commenced. In this situation, under current law, there is usually no need to litigate a passing-on question at all. If the Gorton Proposal is adopted, it is a virtual certainty that the passing-on issue will be introduced into almost every suit of this type. There are two reasons for this. First, under the Gorton Proposal, defendants are protected against duplicative liability only if they assert a passing-on defense. Second, assertion of the passing-on defense provides the defendant with an irresistible strategic advantage: it places the burden on the plaintiff to prove that he absorbed some portion of the overcharge and denies him any damage recovery if he fails to carry that burden.[4] S. 915 and H.R. 2244 also created a likelihood that the passing-on defense would be asserted in a large number of cases in which only direct purchasers sued. However, neither bill created the strong incentives to plead the defense which are contained in the Gorton Proposal and both bills placed limitations on the assertion of the defense. These limitations are not included in the Gorton Proposal.

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[3] The magnitude of this problem can be fully appreciated if it is considered in the context of a class action in which plaintiffs allege a regional or nationwide price fixing conspiracy by a large number of firms in a given industry. The implications which the Gorton Proposal has for class actions are discussed later in this report.

Given the compelling reasons for defendants to assert the passing-on defense under the Gorton Proposal, it can be expected that the passing-on question will be injected into every direct purchaser case. This will necessarily add an additional complicated issue to pre-trial discovery and can be expected to extend the length of time needed to try price fixing cases. It can also be expected to force antitrust plaintiffs to call economic experts in every case to establish that they absorbed some portion of the overcharge. While it is not possible to determine how significant the increase in trial complexity will be, the Gorton Proposal will result in an increase in discovery and trial time as well as litigation costs.

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[4] In cases such as this, the passing-on question appears to be quite similar to the fact of damage question. In fact, it is possible that if the Gorton Proposal is adopted, the passing-on question could be merged with fact of damage. In any event, it is likely that passing-on will become an element of a plaintiff's prima facie case on liability since failure to prevail on the passing-on question will result in no recovery by the plaintiff.

On balance, the Gorton Proposal does address some of the litigation manageability concerns which have characterized the Illinois Brick debate since 1977. While the Gorton Proposal does resolve the manageability problem in one type of case (suits in which only attorneys general sue) it does not fully resolve the problem in cases where both direct and indirect purchasers seek to recover and it creates new manageability problems in cases where only direct purchasers sue. The Gorton Proposal therefore cannot be viewed as a complete or adequate solution to the manageability problem.

B. DETERRENCE AND COMPENSATION.

The policy issue that is at the heart of the debate over the repeal of Illinois Brick and Hanover Shoe revolves around the balance struck between the competing policy interests of compensating all victims of antitrust violations and maximizing the deterrent effect of the treble damage remedy. In reaching its decision in Illinois Brick, the Supreme Court concluded that some sacrifice of the goal of full compensation was appropriate in order to preserve the deterrent effect of the treble damage remedy. Opponents of Illinois Brick have argued that this balance between the goals of deterrence and compensation is inappropriate. They have argued that Illinois Brick sacrificed the goal of compensation too much and that the emphasis on deterrence is overstated because direct purchasers are generally unwilling to sue their suppliers for antitrust violations.

The Gorton Proposal is an attempt to strike a different balance in the deterrence-compensation equation. It attempts to enhance the compensatory aspects of the treble damage suit by permitting attorneys general to sue for damages on behalf of ultimate purchasers of price fixed products. At the same time, it attempts to minimize any loss of deterrence by adding a new group of antitrust enforcers -- the United States and the 50 state attorneys general. In this respect, the Gorton Proposal is conceptually no different from S. 915 and H.R. 2244. The Gorton Proposal has the potential, however, to result in less deterrence and less compensation to victims than would be the case if either S. 915 or H.R. 2244 were enacted.

1. The Gorton Proposal Will Reduce Deterrence.

The Gorton Proposal represents a radical reorganization of the antitrust enforcement scheme. An analysis of that reorganization reveals that it will, in all probability, result in fewer lawsuits being filed, and smaller recoveries in treble damage cases. This will translate into an overall reduction in the deterrent impact of the treble damage remedy.

The Gorton Proposal elevates attorneys general to the status of preferred antitrust enforcers. In so doing, it relegates private plaintiffs to a secondary status. The Gorton Proposal creates this new hierarchy by:

(a) Creating a presumption that the persons or entities represented in attorney general suits are damaged in the full amount of any overcharge;

(b) Imposing on private direct purchaser plaintiffs an affirmative burden of proving that they did not pass on the overcharge upon reselling the product; and

(c) Reducing a private plaintiff's recovery by an amount "properly allocable" to the United States or state attorney general in every action, regardless of whether an attorney general has sued or will ever sue.

These three fundamental changes can be expected to reduce a private plaintiff's incentive to sue because they guarantee, in virtually every case, that the plaintiff's maximum possible recovery will be less -- in some cases substantially less -- than three times the amount of the overcharge. In addition, these changes place a major obstacle in the path of private plaintiffs seeking treble damage recoveries by requiring that they prove that they absorbed at least a portion of the overcharge in order to recover. It can be anticipated that it will be generally quite difficult for private plaintiffs to bear this burden successfully because of:

(a) The complexity of the passing-on issue;

(b) The need for expert economic testimony, in almost every case, to resolve the question; and

(c) The risk that some courts will reject a plaintiff's passing-on evidence on the grounds that it is too speculative.

Given the difficulty of establishing that some portion of an overcharge was absorbed and the likelihood that this issue will become an additional element to proving liability in a direct purchaser case (much like proving fact of damage), the Gorton Proposal imposes a heavy additional burden on private plaintiffs. As a practical matter this can be expected to translate into an increased risk that a private plaintiff who does bring suit will recover nothing at trial despite his ability to prove violation, fact of damage and amount of overcharge. Thus, under the Gorton Proposal a private plaintiff who would succeed at trial today faces a serious risk of being washed out of court because of his inability to meet his burden of proof on the passing-on issue. As a result, private plaintiffs will be far less successful in recovering and thus can be expected to be less likely to bring suit. Similarly, defendants will know that the likelihood of their being sued by direct purchasers has been reduced and that the ability of those purchasers that do sue to recover has been seriously impaired. The net result will be a significant loss of deterrence.

The question remains whether the Gorton Proposal replaces the deterrence lost in the direct purchaser area with the addition of more active enforcement by attorneys general. The answer to this question is necessarily speculative. However, a number of observations can be made which permit a tentative conclusion that increased attorney general enforcement will not be so substantial as to offset the loss of private plaintiff enforcement. Indeed, it is precisely this point that has spawned extensive judicial concern for the role of the private plaintiffs. Governments already have at their disposal enormous powers, both criminal and civil, to which the private plaintiff is often considered an essential addition. It is expected that the loss in direct purchaser enforcement will not be replaced by increased attorney general enforcement under the Gorton Proposal for the following reasons.

First, we do not know whether 51 attorneys general have at their disposal sufficient resources to take the lead role in utilizing the treble damage remedy. While these resources can be increased through additional funding, it is not clear that a limited number of government enforcers, even aided by specially appointed assistant attorneys general, can replace or meaningfully supplement the impressive enforcement resources of the private bar.

Second, it is unlikely that attorneys general will have access to the wide range of information concerning various antitrust violations which comes to the attention of direct purchasers. Since the Gorton Proposal makes state attorneys general competitors of direct purchaser plaintiffs, it is unrealistic to expect that direct purchaser plaintiffs or their counsel will pass on to government enforcers information concerning suspected violations. The only way in which government enforcers will obtain this information is through the mandatory notice which defendants will give when they assert the passing-on defense in a suit initiated by a private plaintiff. Given the disincentives to private suits created by the Gorton Proposal, however, there may be relatively few cases brought by private plaintiffs which would be brought to the attention of the attorneys general.

Third, government enforcers may be subject to varying political pressures which may, unavoidably, limit their ability to commence or vigorously prosecute actions where they have valid claims which should be pursued. While this observation is not meant to imply that state attorneys general will not use the powers provided to them by the Gorton Proposal, it does raise questions about the wisdom of concentrating primary responsibility for antitrust enforcement in the hands of a relatively small number of public officials who are subject to many conflicting political demands.

On balance, while the effects of the Gorton proposal on deterrence cannot be measured with precision, the antitrust enforcement which can be expected from the various attorneys general does not appear likely to offset the loss in successful prosecution of antitrust claims by private plaintiffs. The Gorton Proposal therefore has the potential to result in a net loss in deterrence.

2. The Gorton Proposal May Reduce Victim Compensation.

In addition to reducing the deterrent effect of the treble damage remedy, an analysis of the Gorton Proposal raises questions as to whether it will enhance the related goal of compensation of victims of antitrust violations. There is little question that the Gorton Proposal will allocate to states, either as purchasers themselves or as *parens patriae* plaintiffs, damages which are now recovered by direct purchasers. It is not clear, however, that the total amount of damages recovered as compensation for antitrust injuries will increase under the Proposal. The reason for this relates to the difficulty which direct purchasers can be expected to have in successfully prosecuting treble damage claims under the Gorton Proposal. If the Proposal has the anticipated negative effect on private treble damage enforcement outlined above, there will be a significant loss in the compensation of direct purchasers with no guarantee that recoveries obtained by attorneys general will fully replace that loss in aggregate compensation. Given the obstacles to effective attorney general enforcement discussed above, there is some risk that aggregate compensation to victims of antitrust violations will actually decrease under the Gorton Proposal.

There is also some question whether the proposal can actually achieve its goal of compensating large numbers of ultimate purchasers for antitrust injuries. It can be expected that identifying the ultimate purchasers of the price fixed goods will frequently be difficult or impossible and that courts will often be forced to turn to § 4E(2) of the Clayton Act and deem the *parens* recovery "a civil penalty . . . [to be]

deposited with the state as general revenues." Such a disposition of parens damage recoveries does little to compensate the ultimate purchasers of the price fixed product who are treated by the Gorton Proposal as the primary victims of the antitrust violation. Thus, the Proposal may run into serious obstacles in effecting its goal of compensating ultimate purchasers.

C. RISK OF DUPLICATIVE LIABILITY AND INCONSISTENT JUDGMENTS.

The 1983 Report also criticized S. 915 and H.R. 2244 because they did not provide adequate protection against the risk of duplicative liability being imposed on defendants who were subject to inconsistent judgments in actions brought by attorneys general and direct purchasers. H.R. 2244 provided no mechanism to avoid this risk, although it did prohibit recoveries which duplicated recoveries obtained in prior actions for the same antitrust violation. S. 915 went a step further by requiring that any attorney general who might be entitled to recover on behalf of a state, political subdivision or group of ultimate purchasers be made an indispensable party in any action in which a passing-on defense was asserted. The Section of Antitrust Law deemed both of these approaches to be inadequate because it believed that the only actual means of avoiding the duplicative liability/inconsistent judgment problem was to bring together all direct purchaser plaintiffs and indirect purchaser plaintiffs into a single forum -- a procedure which it conceded would be unworkable. Section of Antitrust Law Report at 27-28.

The Gorton Proposal does not provide a device for bringing all plaintiffs and defendants into a single forum. It does, however, create three mechanisms to guard against the imposition of duplicative liability and the rendering of inconsistent judgments. Taken together, these three devices, could reduce the problem somewhat. However, it is unlikely that the Proposal will eliminate the duplicative liability problem in practice because two of the three mechanisms are of questionable constitutionality. In addition, all of the devices become applicable only where a defendant pleads a passing-on defense in an action brought by a direct purchaser. In the event a defendant lacks a basis for pleading such a defense, or neglects to plead it, the Proposal's protection against double recovery does not apply.

The first protective device in the Gorton Proposal is a notice/intervention procedure by which defendants who have pled a passing-on defense in direct purchaser suits are required to give notice to all attorneys general whom they believe "may be entitled to maintain an action against the defendant." Attorneys general who receive this notice are then given 120 days to intervene in the direct purchaser action and, upon moving to intervene, "shall be joined pursuant to Rule 24 of the Federal Rules of Civil Procedure with respect to" the passing-on issues. This part of the Gorton Proposal provides a means whereby all of the claimants to the potential treble damage recovery can be brought into one forum, but only as to the pass on issue.[5] Moreover, the Proposal does not require attorneys general who receive notice to intervene; it simply provides that they may intervene. In addition, the Proposal is explicit that an attorney general's right to intervene in a private purchaser suit is "in addition to any other remedy" which the attorney general may have. Thus, the notice/intervention mechanism created by the Gorton Proposal does not provide a foolproof method for bringing all claimants into one forum. It also raises the question of the utility of joining state attorneys general with respect to only one issue, passing-on, as opposed to joining them for all issues.

The second device for avoiding double recovery and inconsistent judgments is a collateral estoppel provision which applies both to suits brought by attorneys general and to suits brought by direct purchasers. The Gorton Proposal provides that in both direct purchaser and attorney general actions "there shall be excluded from the amount of monetary relief awarded any amount which (1) duplicates amounts which have been awarded for the same injury to another person who has proven, in fact, such injury in a previous action...." This provision does solve the double recovery problem in those cases in which direct purchasers and attorney general plaintiffs try separate cases to judgment to recover for the same overcharge.[6]

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[5] This part of the Gorton Proposal does not appear to add anything to the existing procedure for intervention under Rule 24.

The third mechanism created by the Gorton Proposal to deal with the duplicative liability/inconsistent judgment problem is contained in a provision which reduces a direct purchaser plaintiff's recovery by an amount which "is properly allocable to the United States, any state or political subdivision or any natural person" in any action where a passing-on defense is asserted. This provision guards against a double recovery problem by carving out an attorney general's anticipated recovery from a direct purchaser's recovery in all cases in which a passing-on defense is asserted, even where the attorney general whose interest is being protected has not filed suit.

These two last devices for dealing with the duplicative liability/inconsistent judgment problem raise serious constitutional questions and can be expected to be subject to attack if the Gorton Proposal is enacted in its current form. Both devices give collateral estoppel effect to antitrust damage judgments so that they may be used to estop persons who were not parties to the original lawsuit from relitigating the passing-on question. This extension of the doctrine of collateral estoppel raises serious questions under the Due Process Clause and it is not clear that these two portions of the Gorton Proposal could survive a constitutional attack on due process grounds. Without these two estoppel provisions, however, the Gorton Proposal does not meaningfully guard against duplicative liability and the rendering of inconsistent judgments. Thus, despite its innovation in this area, the Proposal does not represent a significant improvement over either H.R. 2244 or S. 915.

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[6] However, the provision creates the prospect that a direct purchaser who has filed suit could be estopped by a judgment in favor of an attorney general from proving that he absorbed some portion of the overcharge. This risk is presented by a prior attorney general judgment because the Gorton Proposal does not permit defendants to assert in an attorney general suit that the direct purchaser absorbed some or all of the overcharge. Thus, in attorney general actions, the passing-on question will not be litigated, the attorney general's client will be presumed to be damaged in the full amount of the overcharge and the collateral estoppel effect given to the resulting judgment will bar the direct purchaser from recovering anything. The only means for a direct purchaser plaintiff to avoid this risk is to intervene in or have his case consolidated with the attorney general's suit so that the passing-on question will be litigated. This may not be possible in all cases, however.

D. IMPLICATIONS FOR CLASS ACTIONS.

The 1983 Report expressed concern that the repeal of Illinois Brick and Hanover Shoe would impair the utility of the class action. Specifically, the Section of Antitrust Law feared that assertion of the passing-on defense in class actions would introduce individual questions of fact for each member of a class of direct purchasers and would thereby make class certification impossible under Federal Rule of Civil Procedure 23. This potential barrier to class action certification would become a more serious problem under the Gorton Proposal and could effectively terminate the use of the class action device in private antitrust enforcement. This result may occur because the Gorton Proposal encourages defendants to assert a passing-on defense in every direct purchaser case and the assertion of that defense in a class action can impede the effectiveness of the class action device.

In view of the very significant role which the class action has played in private antitrust enforcement, a change in the antitrust laws which may eliminate the class action as a meaningful enforcement tool should be approached with great caution.

IV. CONCLUSION.

Senator Gorton's new proposal to reverse the rules set down by the Supreme Court in Illinois Brick and Hanover Shoe reflects great thought and displays bold innovation. Notwithstanding these desirable attributes, the Proposal does not resolve effectively the intractable problems which will be created by the reversal of Illinois Brick and Hanover Shoe.

While Senator Gorton's Proposal makes real (albeit incomplete) progress toward resolving the problem of unmanageability, that problem will remain a serious one under his Proposal. The related problem of duplicative liability and inconsistent judgments also cannot be resolved by Senator Gorton's Proposal without resort to a constitutionally questionable extension of the doctrine of collateral estoppel. Finally, those portions of the Gorton Proposal which are intended to address the manageability and double recovery problems will have the severe but unintended side effects of reducing both the deterrent and compensatory effects of the treble damage remedy. In view of these highly undesirable side effects and the failure of the Gorton Proposal to resolve the practical problems which will arise from a reversal of Illinois Brick and Hanover Shoe, the American Bar Association Section of Antitrust Law opposes enactment of the Gorton Proposal.

March 21, 1984

Senator GRASSLEY. It is now my pleasure to call a panel consisting of Dr. Robert G. Harris, professor of business administration, University of California, Berkeley; George J. Benston, professor of accounting, economics, and finance, the Graduate School of Management, University of Rochester, Rochester, NY, and he is appearing on behalf of the Business Roundtable. The third member of this panel is James A. Henderson, Jr., professor of law, Boston University School of Law, Boston, MA, also on behalf of the Business Roundtable.

Would you three come and sit wherever you like? Speak into the microphone, and would you proceed in the order that I gave you, Dr. Harris, Professor Benston, and Professor Henderson?

For those of you who have not testified before, we would appreciate your summary in 5 minutes, and then unless you ask otherwise your statement will be printed in toto in the record.

So would you proceed?

STATEMENT OF A PANEL CONSISTING OF ROBERT G. HARRIS, PROFESSOR OF BUSINESS ADMINISTRATION, UNIVERSITY OF CALIFORNIA, BERKELEY, CA; GEORGE J. BENSTON, PROFESSOR OF ACCOUNTING, ECONOMICS, AND FINANCE, GRADUATE SCHOOL OF MANAGEMENT, UNIVERSITY OF ROCHESTER, ROCHESTER, NY, ON BEHALF OF THE BUSINESS ROUNDTABLE; AND JAMES A. HENDERSON, JR., PROFESSOR OF LAW, BOSTON UNIVERSITY SCHOOL OF LAW, BOSTON, MA, ON BEHALF OF THE BUSINESS ROUNDTABLE

Dr. HARRIS. Thank you, Senator.

Shortly after the *Illinois Brick* decision, Prof. Lawrence Sullivan of the law school at Berkeley and I authored an article in the Pennsylvania Law Review and then several replies and comments thereafter, and I have made available to the committee copies of the article and comments and intend to draw from them in my testimony today.

Although S. 915 limits the offensive use of passing-on to attorneys general, the spirit of the legislation is entirely consonant with the views expressed in the article and I support it wholeheartedly.

Using the standard models of economic theory, it can be readily demonstrated that in the short run a very large share of any monopoly or fixed-price overcharge is likely to be passed on to downstream customers. In the long run the likelihood of passing-on is even greater. Only in the rarest of circumstances would direct purchasers not pass on overcharges to their customers, the indirect purchasers.

If we take into account normal commercial pricing practices, we find that the predictions of economic theory are conservative. Passing-on is even more likely to occur in the real world than in the theoretical world of economics.

In fact, in many commercial situations standard markup pricing by wholesalers, retailers, contractors and others will cause the rate of passing-on of an overcharge to actually exceed 109 percent.

On the grounds that passing-on occurs frequently and, in fact, is the normal course, we turn to the issue of damage measurement. Without denying that it is inherently difficult, we argue that the identification of the chain of purchasers and the degree of passing-on in any particular case is well within the capabilities of our judicial system.

Those who argue otherwise typically cite cases involving extreme complexity and reason that because the measurement of passed-on damages is difficult in some cases, we ought not allow it in any case.

But there are many cases in which the measurement would be straightforward. Businesses do keep records of their pricing practices from which the degree of passing-on can be readily inferred.

Judging from the widespread support of State attorneys general for this legislation, they must be confident that in many cases they have the capacity to meet reasonable standards of proof.

In those extremely complex cases where measurement would be difficult or even impossible, we can presume that attorneys general would take that factor into account in deciding whether to bring suit.

To test out our theories and analysis to the actual practice of public antitrust suits, we did an intensive study of 65 recent price-fixing cases in which the Department of Justice had obtained either a guilty verdict or a plea of nolo contendere.

We analyzed those cases with two questions in mind: how often does passing-on occur, and how feasible is the identification of indirect purchasers and the measurement of passing-on.

The essential facts of that study are these: In 57 of the 65 cases, the direct purchasers from the price-fixers were not the final consumers of the product. In 48 of those 57 cases, indirect purchasers as a class were readily identifiable and, in fact, in 12 cases it was easy to identify the actual individual indirect purchasers, most of whom were State government agencies.

In at least 28 of these 48 cases, it is highly probable on the basis of our analysis that all of the overcharge—or more than all of it—was passed on to indirect purchasers, and in most of those empirical proof of passing-on would have been readily obtained and measurement of damages straightforward.

On the basis of our analysis, we presented the following conclusions on the appropriate policy response to *Illinois Brick*.

First, judicial capacity and the feasibility of measuring damages: The most frequent criticism of S. 915 or similar legislative remedies is that overturning the *Illinois Brick* rule would make damage measurement so complex as to make it infeasible. That it would increase complexity in some cases is inarguable. That it would make damage measurement infeasible is a gross exaggeration.

Second, duplicative liability: Another frequent criticism is that defendants will be subjected to multiple duplicative liability. Although an appropriate concern, there are adequate adjudicatory remedies to eliminate or minimize the problem. So that point should not serve as an obstacle to the passage of this legislation.

Third, compensatory justice: The ideal of our antitrust laws is that the fair price of any good or service is its competitive price, and that any price illegally exceeding that competitive price is an ill-gotten gain. It is on this count that *Illinois Brick* doubly offends the spirit of the antitrust laws. It denies indirect purchasers legal redress, while providing direct purchasers the possibility of windfall gains. S. 915 would provide at least a partial remedy of this inequity.

Finally, deterrence effects: Opponents of 915 have argued that it would seriously undermine the effectiveness of the private damage action as a deterrent to antitrust violators. Frankly, if that argument were being advanced by long-standing supporters of vigorous antitrust enforcement, I would attach a higher level of credibility to it.

But associations such as the Business Roundtable are staunch in their opposition to this legislation because they know full well that it will increase the effectiveness of antitrust legislation; that it will increase the probability that price-fixers will be brought to court and pay for the damages that they impose upon indirect purchasers.

For those who argue that direct purchasers would sue and would then be an important deterrent, the *Illinois Brick* case itself is instructive on this point. Why had the direct purchasers there not brought suit against the price-fixers?

In conclusion, I should point out that the increasing skill and sophistication of State attorneys general in antitrust is one of the most hopeful signs of our free enterprise system, and Illinois Brick has done great harm to the State enforcement capacities of those attorneys general.

If the law is serious about deterring price-fixing, then it is surely counterproductive to prevent those most vigilant in protecting the public interest in competitive pricing from pursuing legitimate claims on behalf of their State political divisions and citizens.

[The prepared statement follows:]

Prepared Statement

of

Dr. Robert G. Harris

Professor of Business Administration

University of California, Berkeley

I appreciate Senator Rudman's invitation and the opportunity to testify before the Committee in support of Senate Bill 915 which, in my opinion, will improve both the effectiveness and fairness of antitrust enforcement. Although legislative remedy of the Supreme Court's decision in Illinois Brick is long overdue, and the proposed bill is limited in scope, this legislation has the potential to close a substantial loophole in the law.

As a Professor of Business Administration, my research and teaching specialization are in the field of antitrust and regulation. I have written more than 40 professional articles and reports on these subjects and have taught graduate antitrust and regulation courses in the Department of Economics, the School of Business and the School of Law at Berkeley. I have served as a consultant to and expert witness for public enforcement agencies and private antitrust parties, including the Antitrust Division of the U.S. Department of Justice and California Department of Justice.

Shortly after the Illinois Brick decision, Professor Lawrence A. Sullivan (Earl Warren Professor of Public Law, University of California, Berkeley) and I published an article in the Pennsylvania Law Review (Volume 128, No. 2, December, 1979): "Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis." Additional comments were made in successive issues of the Review: "Passing on the Monopoly Overcharge: A Response to Landes and Posner" (Volume 128, No. 5, May, 1980); and "More on Passing On: A Reply to Cooter and to Viton and Winston" (Volume 129, No. 6, June, 1981). In those articles, we criticized the Court's Illinois Brick decision; analyzed the negative effects of that decision on antitrust enforcement; and proposed legislation to remedy the problems created by the decision.

Although S.915 limits the offensive use of passing on to Attorneys General, the spirit of the legislation is entirely consonant with the views expressed in our articles and I support it wholeheartedly. This testimony will briefly summarize the analysis and arguments made in those articles, with specific reference to the provisions of S. 915. (Note: Reprints of the article and replies are attached to my testimony; numbers in brackets refer to page numbers in those reprints).

A. Passing On: Economic Theory and Commercial Practice

Using the standard models of economic theory, particularly the theory of tax incidence, we demonstrated that in the short-run, in most markets, a large share of any monopoly or fixed-price overcharge is likely to be passed on to downstream customers [275-290]. We also showed that, in the long run, the likliehood of passing on is even greater; only in the rarest of circumstances would direct purchasers not pass on overcharges to their customers, the indirect purchasers [290-298].

While we readily admitted the limits of economic theory in this regard [299-303], we went on to show that, given normal commercial pricing practices, the predictions of economic theory are conservative: passing on is even more likely to occur in the real world than in the theoretical world of economics! In fact, in many commercial situations, standard mark-up pricing by wholesalers, retailers, contractors and others, the rate of passing on is likely to exceed 100% [303-315]. Consider a simple example: let's say a state agency purchases supplies from wholesalers who customarily mark-up merchandise 50% above their invoice prices, so an item purchased for $10 is sold for $15. Because the manufacturers of that item fix their prices at $12--a $2 overcharge, the wholesaler now sells the item at $18 ($12 plus 50% of $12). As a result of the mark-up, the state pays an additional $3 for the item, more than the original overcharge by the price-fixers. Note also that, as a result of the overcharge, the wholesaler earns a gross margin of $6, rather than $5, for each unit it sells.

B. Determining the Rate of Passing On in Particular Cases

One of the central controversies in the debate over passing on relates to the feasibility of measuring damages if passing on is allowed by plaintiffs. Without denying that damage measurement is inherently difficult, the identification of the chain of purchasers and the degree of passing on is well within the capabilities of our judicial system in most circumstances. Those who argue otherwise typically cite cases involving extreme complexity and reason that, because the measurement of passed-on damages is difficult in some cases, we ought not allow it in any cases.

As our article shows, there are many cases in which measurement of passing on would be straightforward. Not only does economic theory provide numerous guides to measurement [315-320]; businesses do keep records of their pricing practices, from which the degree of passing on can be readily inferred [3210-321]. Judging from the widespread support of State Attorneys General for this legislation, they are confident that in many cases they have the capacity to meet the courts' standards of proof in this regard. In those extremely complex cases where measurement would be difficult, or even impossible, Attorneys' General would take that factor into account in deciding whether to bring suit.

C. Analysis of Passing On in Recent Price Fixing Cases

In the article, we studied and presented summary facts on 65 recent price-fixing cases in which the Department of Justice had obtained either a guilty verdict or plea of nolo contendre. We analyzed those cases with two purposes in mind: (a) how often does passing on occur? (i.e., the incidence of fixed-price overcharges born by indirect purchasers); and (b) how feasible is the identification of indirect purchasers and the measurement of passing on? The summaries of the 65 cases are listed in the Appendix [355-360] and discussed in text [321-338].

The essential facts of that study are these:

* In 57 of 65 cases, the direct purchasers from the price-fixers were not the final consumers of the product, so passing of monopoly overcharges may have occured.
* In 48 of those 57 cases, indirect purchasers as a class were readily identifiable (which is not to say that indirect purchasers could not have been identified in the remaining cases).
* In 12 of those 48 cases, it was possible to identify the individual indirect purchasers, many of which were government agencies.
* In at least 28 of those 48 cases, it is highly probable that all of the overcharge was passed on to iudirect purchasers; in most of those, empirical proof of passing on would have been readily obtained and measurement of damages to indirect purchasers straightforward.

D. Critical Policy Issues

On the basis of our analysis, we presented the following conclusions on the appropriate policy response to Illinois Brick:

1. Judicial Capacity and Feasibility of Measuring Damages

The most frequent criticism of S.915 or similiar legislative remedies is that overturning Illinois Brick would make damage measurement so complex as to make it infeasible. That it would increase complexity in some cases in inarguable; that it would make damage measurement infeasible is an exaggeration [338-343]. The enforcement of antitrust laws in an advanced economy is inherently complex, but vitally important. As a class of business torts, we should follow judicial policy in that area of the law, namely to extend liability as as far as causalties can be efficiently traced.

2. Duplicative Liability

Another ~~frequent~~ criticism of allowing the offensive use of passing on is that defendants will be subjected to multiple, duplicative liability. Although an appropriate concern, there are adequate adjudicatory remedies ro eliminate or minimize the problem, including the statute of limitations, case consolidation, and the allowance of the defensive use of passing on included in S.915 [343-346]. Moreover, limiting indirect purchaser suits to those brought by Attorneys General will also reduce the possibility of duplicative liability, since AG's will have incentives to conduct a preliminary analysis of the incidence of alleged overcharges prior to bringing suit.

3. Compensatory Justice

The ideal of the antitrust laws is that the fair price of any good or service is its competitive price; that any price illegally exceeding the competitive price is an ill-gotten gain [343-348]. It is on this count that Illinois Brick doubly offends the spirit of antitrust laws: it denies indirect purchasers legal redress while providing direct purchasers the possibility of windfall gains (including direct purchasers who passed on more than 100% of the original overcharge). S.915 would provide at least partial remedy of this inequity.

4. Deterrence Effects

Opponents of S.915 argue that "permitting the use of 'pass-on' theories will... seriously undermine the effectiveness of the private damage action as a deterrent to antitrust violators" (testimony of Leo R. McDonough, Committee hearings, June 8, 1983). Were that argument being advanced by long-standing supporters of vigorous antitrust enforcement it would be more credible, but that is not the case. It is highly improbable that State Attorneys General would support this legislation if it would in fact reduce their effectiveness.

In my view, the net effect of S.915 will be very positive. There are many instances in which direct purchasers have little incentive to sue (they are benefitting from the overcharge through their own mark-ups) and often strong disincentives (they rely on the alleged price-fixers for critical supplies) [349-353]. The Illinois Brick case itself is instructive on this point: why hadn't the direct purchasers brought suit against the price-fixers?

E. Summary and Conclusions

The increasing skill and sophistication of State Attorneys General in antitrust is one of the most hopeful signs for the free enterprise system. Illinois Birck has done more than reduce state enforcement of the federal law: it also discourages states from refining and vigorously enforcing their own antitrust laws. If the law is serious about deterring price-fixing, then it is surely counterproductive to prevent those most vigilant in protecting the public interest in competitive pricing from pursuing legitimate claims on behalf of their state, political divisions and citizens.

Our analysis uncovers the misapprehensions that underlie the Illinois Brick decision and brings into focus several of the deficiencies in the policy established by that decision. There is simply no credible argument that courts cannot handle passing-on issues. Clearly, they can. When they fail to do so, they sacrifice teh desideratum of compensatory justice. Nor is there any credible basis for concluding that antitrust enforcement is invigorated by the rule of Illinois Brick; more likely its effect is quite the opposite. Congress, therefore, should pass this legislation in the interest of deterring price-fixing and compensating the actual victims of those offenses.

Senator GRASSLEY. Professor Benston.

Professor BENSTON. Thank you, sir.

Before I was asked by the Business Roundtable to analyze the *Illinois Brick* decision, I was of the general opinion that it was a bad decision. It seemed obvious that, since consumers ultimately pay for everything, including higher prices due to collusion, they should have the right to sue price-fixers.

Therefore, I believe I understand the motivation of many people who want to repeal or modify the rule. But since analyzing the economics of the situation, I have reached the very strong conclusion that changing the rule would result in worsening the situation for consumers and for innocent producers.

In particular, Senator Gorton's proposal, contrary to his belief in it, would be unfair, and would reduce deterrence and increase the complexity of the situation. It would be particularly unfair to innocent producers and to the small business people generally who would be caught in the middle between the State attorneys general and the alleged pricefixers, and would have to pay without getting anything in return.

The most important aspect of the situation, though, is with respect to deterrence, because consumers pay if price fixers are not deterred from doing what they do. Catching them in the act and punishing them is difficult, at best. Therefore, consumers are best served when incipient price fixers are deterred. Hence, though compensation for damages inflicted on consumers is desirable, it is much better if the price fixers were deterred by a meaningful expectation that they will be sued and will pay heavily for their wrongdoing.

For the following reasons, deterrence is much more likely to occur when only direct purchasers are given standing to sue. First, there is the question of detection. The *Illinois Brick-Hanover Shoe* rule gives standing to sue to the people who are most likely to detect price fixing—those who purchase directly from price fixers.

Since products that are purchased indirectly go through many hands, each of which adds value to and often changes the product, it is very difficult for consumers who are indirect purchasers to distinguish between higher prices that are due to higher costs or due to collusive practices. State attorneys general would have similar difficulties, and indeed I might say would have incentives toward any going to those products and services which seemed most obvious and applicable to consumers—consumer goods—and are likely to leave alone things that are complex, where price fixing is much more likely.

The second is incentives to sue. The rewards from suing—that is, the damages awarded net of costs—would be decreased if indirect purchasing consumers were given standing to sue.

Even if all damages were ceded to State attorneys general suing on behalf of consumers—that is, the parens patriae concept—as Senator Gorton proposes, direct purchasers who were damaged still have a rebuttable claim to damages. Consequently, the incentives of both indirect purchasing final consumers and direct purchasers would be diluted, and that would reduce very considerably their incentive to go through the difficulty and costs of finding the pricefixers and bringing suit against them.

Next is the cost of proving damages. Part of the damages from price fixing are passed on and part are not. I disagree with my colleague from Berkeley about the difficulty of finding out what was passed on and what was not—I think that is extremely hard to accomplish and it is not nearly as obvious. I have read his articles and I think we have a difference of opinion which, in my written testimony, is expressed more directly.

The virtual impossibility of demonstrating the amounts actually passed on is the principal reason that the Supreme Court ruled in *Hanover Shoe* that defendants could not claim that the plaintiff incurred no damages because it had passed on an overcharge, and in *Illinois Brick* that indirect purchasers could not claim that the overcharge was passed on to them.

If indirect purchasing final consumers were given standing to sue, directly or through State attorneys general, direct, immediate purchasers would have to prove that they did not pass on the overcharge. The cost of this effort would seriously discourage them from suing.

In addition, the final consumers would find it very difficult to demonstrate that they bore the damages. Senator Gorton's proposal would not eliminate this cost, since once an action was underway, direct purchasers still could attempt to prove that they bore part of the damages. They would also have the difficulty of proving which consumers in which State actually bore the damages for any good that was sold in many States.

A good example would be anything in a manufactured product that then goes through various stages and ends up being sold to consumers all over the country. Which State is the one that had the damages? That would have to be demonstrated, and that is very difficult and time consuming and expensive.

Next thing is the cost of advancing and coordinating actions by multiple direct and indirect purchasers. If both direct and indirect purchasing final consumers can sue alleged price fixers, the costs of an action would increase considerably, thus reducing the rewards from and hence the incentives for suits.

Senator Gorton's proposal would reduce this problem, though at the cost of practically eliminating direct purchasers as potential plaintiffs, particularly as originating plaintiffs, and hence reduce deterrence very considerably.

The empirical evidence on this issue, I think, is very important, since most critics of the *Illinois Brick-Hanover Shoe* rule fear that direct purchasers will be reluctant to sue because they are in too direct contact with possible price fixers.

However, all of the seven empirical studies on this question show that direct purchasers do most of the suing and appear very willing to undertake such actions. Most of the lawsuits, both before and after the *Illinois Brick* decision, were brought by direct purchasers.

The number of suits following Department of Justice antitrust price fixing cases were, if anything, relatively more numerous after compared to before the decision. To my knowledge, no evidence to the contrary has been produced.

Further, the States can put, and have put in many instances, clauses in their purchase contracts which give them the right to sue in the place of the direct purchases. So, as far as States being able to sue for the purchasers of the State, they can do that right now and many States—in fact, about a third—are doing it.

Then there is the very importance aspect of misdeterrence because not all companies accused of price fixing are really guilty. Some are innocent, and nevertheless appear to be guilty. Some innocent producers are sued because of the potential rewards to plaintiffs and their attorneys. When this misdeterrence occurs, both companies and consumers are damaged.

There is likely to be less misdeterrence when only direct purchasers have standing to sue because, unlike final consumers and State attorneys general, they are more likely to bear the costs of incorrectly charging their suppliers with price fixing. Direct purchasers also are more able to distinguish between prices due to legitimate costs and those due to price fixing.

Were Senator Gorton's proposal enacted, innocent intermediate companies would be faced with the considerable costs of discovery as the final consumers sued the initial producers. I think that would be very detrimental, particularly to smaller businesses, because they would have the costs of discovery inflicted upon them. All of their records would be subject to both sides in the dispute and they would get nothing out of it other than costs that, I think, for smaller businesses would be absolutely destructive.

Eventually, these costs would be paid by consumers. But in the interim, the damage to companies, particularly small businesses, could be considerable.

Then there is the question of compensation to final consumers, the question of fairness. To determine the amounts that indirect-purchasing consumers might get if they were given standing to sue, an estimate was made of the gross amounts awarded in the more important price-fixing cases that were settled since the *Illinois Brick* decision.

Summing up all the cases over a 6-year period, for the nine non-building-materials cases the amounts awarded before attorneys' fees per person amounted to $6.78 over the 6-year period, or $1.13 per year, and per household $15.46, or $2.58 a year. For the four building supply cases, the totals are $25.85, or $4.31 a year, per unit of new housing. If attorneys' fees and awards to direct purchasers that could prove damages were deducted, the remaining amounts would be hardly more than a few dollars per household.

So the amount of compensation we are talking about is trivial, and what is much more important to consumers is that price-fixers be deterred rather than that consumers be rewarded.

Further than that, the amounts estimated that might go to the States if they were given standing to sue in the place of direct purchasers for their purchases are small. We are talking about, per State, an average of $140,000 a year. I wish that would balance the State budget; that would be lovely. But I doubt if it will.

Thus, at best, individual consumers would not get much. If Senator Gorton's proposal were enacted, the actual consumers who were damaged would have to be identified. If this could not be done, which is probably what would happen, the damages would go to the State treasuries. While this would benefit someone, the compensation would not go to the people who were actually injured. Furthermore, the direct purchasing companies who were damaged probably would not be able to collect much, if anything. So on the fairness issue, the Gorton proposal fails utterly.

In conclusion, I would say that if Senator Gorton's proposal or the other *Illinois Brick* repealers that have been proposed were enacted, the following probably would be the result.

Deterrence of price fixing would be reduced as the primary source of lawsuits, direct purchasers, was severely discouraged from suing. Direct compensation to individual consumers would be negligible.

Consumers would bear the costs incurred by innocent initial producers who were sued by attorneys, private and State, who were unable or uninterested in distinguishing the guilty from the innocent.

Innocent intermediate producers would have costs imposed on them. Indirect purchasers still could not sue, but they would be subjected to discovery and other costs as final consumers and direct purchasers tried to demonstrate who bore the damages. Direct purchasers would find it much more difficult to sue even though they incurred most or part of the damages.

Innocent companies would be much more likely to be sued. Small companies, in particular, would be adversely affected. Price fixers would benefit since deterrence would be reduced, and significant costs would be inflicted on the rest of society due to the less effective deterrence of price fixing, costs imposed on innocent companies, and higher court costs.

Senator **GRASSLEY**. Thank you.

Professor Henderson.

Professor **HENDERSON**. Thank you, Senator. Can I assume that my written statement will be part of the record?

Senator **GRASSLEY**. Yes.

Professor **HENDERSON**. I am not an antitrust expert, nor am I an economist. I teach tort law and have written for some 15 to 20 years in the fields of tort and products liability. My message is simple and straightforward.

Based on my 15 to 20 years of teaching and writing in torts, I can assure the committee that the *Illinois Brick* rule fits comfortably into the traditional fabric of American liability law.

As I understand it, the proponents of S. 915 have two major objections to *Illinois Brick:* first, that it denies parties harmed by price-fixing activities recovery; and, second, that it allows parties to recover for harms they have not incurred.

The implication is that *Illinois Brick* is a strange aberration. Well, based on my experience, that just is not so. A number of examples in tort law reveal that courts have reached essentially the same conclusion as reached by the Supreme Court in *Illinois Brick*. Let me give you quickly a couple of examples; I have more in my statement.

A clear example of a person who is harmed being denied the right to recover is the rule proscribing recovery for pure economic harm. Suppose that the defendant tortiously damages a factory, causing it to close for a week. The owner of the factory, directly harmed by the tortious conduct, may recover for the property damage and, within limits of foreseeability, the resulting economic loss.

Employees put out of work for a week may not, and have not been able to recover in tort for a hundred years in our system. Nor may a restaurant down the street, that suffers a loss in business indirectly, recover in tort.

An example of a party recovering for harm not suffered involves the collateral source rule. Imagine that a defendant tortiously injures a plaintiff who suffers harm and spends a week in the hospital receiving medical care, all of which is covered by one form or another of insurance.

When that plaintiff later sues in tort to recover for his injuries, he can recover every penny of the medical costs, regardless of fact that he has paid not 1 penny of them. And the indirect source, the insurance company, has no rights in tort to sue to recover for the harm that they have actually suffered.

An example of a combination of these two features in a tort case would involve harm to a decedent. Imagine that a defendant tortiously injures someone, causing his death, and that person, the decedent, is survived by a widow and a brother.

The widow, under the law of most States, may recover for the conscious pain and suffering of the decedent prior to his death, though it is obvious that that is harm that she did not directly and personally suffer. Now, she may also recover for her upset and grief, but may the brother?

Even if he is a twin with very close family ties, under the law of no State may the brother recover for harm he obviously directly and very palpably suffered. Why? Well, I think there are a couple of reasons that track the *Illinois Brick* ruling.

First, denying recovery on the part of those that obviously suffer harm is done for what I would call basically process reasons. The courts perceive that proof is very difficult. The measure of damage is hard to assess the proximate cause link between the harm allegedly suffered and defendant's conduct is very difficult.

Rather than face an enormous, endless queue of persons waiting to come in and argue that they were indirectly but very palpably harmed, the courts have said no, and I think sensibly.

The reasons for allowing persons not actually suffering harm to recover not only deal with process, but also substance. It is felt that someone must carry the ball, lest the defendant get off lightly and deterrence objectives suffer. So parties who have not actually suffered harm are frequently, as I have suggested, allowed to recover. And this, in my 15 years of experience in tort, makes great, good sense, and it has been in the system for a hundred years.

I think the example of the decedent is the starkest example of the tort system trading off the values, much as the Supreme Court did in *Illinois Brick*. Thus, from a torts perspective, overturning *Illinois Brick* appears a strange result, rather than retaining it.

Now, the proponents of this latest version of S. 915 suggest that they have solved the process difficulties. This is different than tort because the presumptions exist and are rebuttable. Well, I have a simple observation to make with respect to that.

If they really are rebuttable, then the process difficulties remain, and let us not kid ourselves. If they turn out through time, de facto, not to be rebuttable, and that well may be the possibility, then what do we have? Proponents of a measure suggesting that all injured parties should recover, and only injured parties, in fact, allowing quite the opposite. And if that were to occur and if this proposal really would simply now allow the States and municipalities to take the place of the direct purchasers, then any argument based on fairness that injured parties should recover, and only injured parties, must fail.

So, to sum up my position, I want to assure everyone that the *Illinois Brick* ruling is in very good company in the law of torts, of which we torts people tend to view it as a small subpart.

Thank you.

Senator GRASSLEY. Thank you very much. We have no questions to ask at this point, so I want to thank you all very much for coming and I will go on now to the next witness.

[Prepared statement follows:]

SUMMARY OF STATEMENT
OF
JAMES A. HENDERSON, JR., PROFESSOR OF LAW
BOSTON UNIVERSITY SCHOOL OF LAW

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

MAY 16, 1984

1. The 1984 draft of S.915 would reverse the rule adopted by the Supreme Court in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Illinois Brick essentially limits antitrust damage actions to plaintiffs who purchased directly from enterprises that violated the antitrust laws. S.915 would allow states or the United States to recover damages in some antitrust cases even though they were only indirect purchasers. S.915 also would allow states to recover in the place of indirect purchasers. Proponents of S.915 object to Illinois Brick on two grounds. Both grounds rest on the presumption that those who purchase directly from antitrust violators pay more for the affected products, but pass their increased cost on to ultimate purchasers such as state and local governments. Illinois Brick is objected to, first, because some entities that are harmed by antitrust violations (indirect purchasers to whom overcharges have been passed on) are not allowed to recover. Second, the rule is objected to because other entities that are not harmed (direct purchasers who have passed on the overcharges) are allowed to recover. The Illinois Brick rule is then condemned as an ill-advised departure from the sort of liability rules that obtain in other areas of the law.

2. I am not an expert in antitrust law or economics. Consequently, I will not evaluate the degree to which the harmful effects of antitrust violations are borne by direct purchasers or are passed on to indirect purchasers. Rather, I will address the contention that what the Illinois Brick rule does is without parallel in other areas of law. Indeed, there are quite a few analogies in other areas. I will address mainly tort law, which is my principal area of expertise.

3. Tort law shares with antitrust a concern for deterring undesirable conduct. The two fields also share reliance on private damage suits to secure the deterrence goal

and, simultaneously, to compensate injured parties. What might be termed the "standard" approach in tort law has several elements: (1) the undesirable conduct is described in general terms, and anyone can enforce the legal prohibition in court; (2) to succeed, plaintiff must show violation of the legal norm plus injury to plaintiff; and (3) the penalty exacted of defendant is equal to the injury suffered by plaintiff. This standard tort law approach under many circumstances achieves the goals of deterrence and compensation without undue process costs.

4. There are, however, circumstances in which this standard approach does not work well. If it is difficult to detect the injury, to identify the injuring party, or to prove the extent of injury or its causal connection to a violation of law, the standard approach will produce too little enforcement and too little deterrence. In other circumstances, the standard rule may provide too much deterrence, discouraging socially valued conduct as well as undesirable behavior. When issues are costly to litigate and their resolution is subject to a high probability of error, a peculiar result may obtain. Because plaintiffs pay their own litigation expenses, the high cost and risk of litigating such issues may lead to undercompensation of injured parties. At the same time, because defendants pay their own litigation expenses, the fear of an expensive law suit may produce overdeterrence.

5. A variety of tort doctrines deal with these problems of costly litigation and of potential under or overdeterrence. The refusal to compensate persons who suffer purely economic harm from tortious behavior, or who suffer emotional harm from observing tortiously caused harm to others, removes a difficult issue from many cases and alleviates a real possibility for overdeterrence. In the case of economic harm, the causal connection of injury to tortious conduct presents problems. In "fright without impact" cases -- cases in which the plaintiff claims to have suffered psychological upset from observing another person suffer physical injury -- the degree

of plaintiff's injury also is often problematic. The benefits of removing these issues from tort suits come at a cost: the rules necessarily preclude recovery by some persons who have suffered real injury. But these tort rules reflect the judgment that this cost is worth incurring.

6. At the opposite pole are tort rules that permit recovery beyond the extent of plaintiff's injury. The "collateral source" rule allows a plaintiff to recover from a tortfeasor for his injury, even if the plaintiff has been fully compensated from other sources. The negligent automobile driver, thus, must pay for his victim's hospital stay despite the fact that the victim's stay was paid for by insurance or by his employer or by someone else. The rules governing recovery for injuries to a decedent similarly provide compensation in excess of plaintiff's loss. To the extent these rules provide a "windfall" to plaintiffs, they do so in order to provide the appropriate levels of deterrence to putative defendants.

7. The rules governing corporate derivative suits provide an example of the combination of preclusion of recovery by those who were injured plus allowance of recovery by persons who may not have been injured at all. These rules are justified as providing the appropriate level of deterrence at tolerable process costs.

8. At first glance, it may seem possible to see room for improvement. Windfall gains or losses appear to accompany each departure from the standard tort liability rule. The appearance, however, is illusory. These doctrines seem imperfect because they do not fully align recovery with injury. But any attempt to secure more perfect justice is likely to entail so much additional expense and uncertainty as to leave us further from our goals.

9. In my judgment, the antitrust law leading up to and including _Illinois Brick_ is analogous to the situations I have just described. At the outset, antitrust law departs from the standard approach to liability by providing for treble damages. The underlying assumption is that difficulties of

detection, identification, and proof would lead to underdeterrence but for this windfall to successful plaintiffs. The difficulties of litigating antitrust disputes, together with the treble damage provision, require other rough adjustments to preserve the appropriate deterrent level. The prohibition of a passing on defense in Hanover Shoe v. United Shoe Machinery Co., 392 U.S. 481 (1968), and Illinois Brick's restriction of suit by indirect purchasers seem appropriate adjustments. Those decisions keep the complex passing-on issue out of litigation and presumptively invest the antitrust right of action in the party that well might be thought to be most directly and demonstrably injured. To the extent an indirect purchaser is better situated to enforce the antitrust laws, such a party can take an assignment from the direct purchaser. See In re Fine Paper Litigation, 632 F.2d 1081 (3d Cir. 1980).

10. The ultimate question for this Committee is whether S.915 improves on the present, admittedly imperfect set of adjustments. Unlike previous proposals to overturn the rule of Illinois Brick, the current version of S.915 appears to recognize that every rule for antitrust liability will be imperfect: some injured parties will not recover and some parties will recover more than necessary to compensate for their injury. The structure of this bill implicitly accepts the view I have argued here, that the proper question is not whether some rule can eliminate this imperfection but what rule produces the best results overall. The answer to that question turns on the cost and difficulty of litigation as well as the magnitude and distribution of payments from defendants.

11. Under one view, S.915 might be seen as simply reversing the presumption about who usually bears the major cost of antitrust violations. Illinois Brick assumes that direct purchasers bear more of the cost than indirect purchasers. S.915 rests on a contrary assumption. Under this view, there is no a priori basis for preferring S.915 to the current law. The choice of one or the other must rest on specific factual information to which I, for one, do not have access.

12. A different, and I think more accurate, view of S.915 distinguishes it more sharply from current law. The bill allows governments suing as, or on behalf of, indirect purchasers, to recover triple the amount a direct purchaser who passed on none of his increased cost would have suffered. While this seemingly avoids the cost and uncertainty that litigation of the passing-on issue entails, S.915, unlike the current law, makes litigation of this issue likely. S.915 still allows both direct and indirect purchasers to bring suit against alleged violators. Direct purchaser plaintiffs are permitted to recover if they can prove that all or part of the damages have not been passed on. This reintroduces the difficulties of complex and costly litigation that the Hanover Shoe and Illinois Brick decisions, like their counterparts in other areas of tort law, sought to avoid.

Senator GRASSLEY. The next individual to testify is Jeffrey H. Joseph, vice president for domestic policy, chamber of commerce. Welcome, and I ask you to proceed.

STATEMENT OF JEFFREY H. JOSEPH, VICE PRESIDENT FOR DOMESTIC POLICY, CHAMBER OF COMMERCE OF THE UNITED STATES

Mr. JOSEPH. Thank you, Mr. Chairman.

Senator GRASSLEY. Before you start, I wish to thank your organization personally for their support of the Grassley-Kassebaum-Biden-Baucus budget freeze. I have not had a chance to communicate that to your leadership and I would appreciate your taking it back to them.

With rising interest rates in the last 2 or 3 weeks, I think it makes a dramatic move like your organization supported much more important now than before.

Mr. JOSEPH. Well, we also thank you for your leadership on that.

Mr. Chairman, my remarks will be very brief. I would like my whole statement submitted for the record.

Nearly 7 years ago, we testified in support of the Supreme Court's decision in *Illinois Brick*. We said then that judicial time, problems of proof and promotion of antitrust enforcement dictated that decision. Nothing has occurred to change our mind.

Let me add that there have been some references this morning to opposition, to overturning that decision coming primarily from the Business Roundtable as a representative of the business community. They, too, have the same position that we have.

I think it is important to differentiate our membership versus theirs. They are primarily large companies. We have over 200,000 companies of all shapes and sizes, primarily small, as well as 4,000 State, local and regional chambers of commerce and business federations. Our broad-based membership does not want to get caught up in the kinds of problems that could be created by the revocation of the *Illinois Brick* rule.

Certainly, there are no new solutions on how to prove pass-through. Whether the indirect purchaser is a private citizen, or the State is substituted as an artificial plaintiff, the problems of tracing an overcharge are the same. We reject the notion that simply by substituting the State as a plaintiff, the problem vanishes.

Also, as a sidelight, I would like to mention that I have never heard anyone address what would happen if the State were simultaneously acting as a substituted plaintiff and as a proprietary one.

Mr. Chairman, let me just make one quick comment about enforcement and fairness. The evidence has been coming in over the last 7 years. We have heard a number of examples this morning from the ABA's testimony and from the professors that direct purchasers do sue their price-fixing suppliers.

We as a society should be interested in seeing that price-fixers continue to face the full fury of their victims. Direct purchasers are those who are in the best position to do that.

These pending *Illinois Brick* proposals simply eliminate the incentive for direct purchasers to bring these suits, and this is especially true in the present amendment that places an affirmative duty on the direct purchaser plaintiff to prove no pass-on of an overcharge to a third party. In our view, this amendment would place a greater burden on an innocent plaintiff than on any defendant, and the obvious result again would be that direct purchaser actions would inevitably be curtailed.

Mr. Chairman, let me say again that the chamber emphatically supports action against price-fixers. We believe this is best accomplished by accepting the wisdom of the Supreme Court in *Illinois Brick* and leaving the law as it is.

Senator **Grassley**. Thank you very much. I have no questions at this point, but you may expect some in writing from myself as well as other members. Thank you.

Mr. **Joseph**. Thank you, Senator.

[Prepared statement follows:]

Chamber of Commerce of the United States of America
Washington

STATEMENT
on
TAXPAYERS ANTITRUST ENFORCEMENT ACT OF 1984 (S. 915)
before the
SENATE JUDICIARY COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Jeffrey H. Joseph
May 16, 1984

I am Jeffrey H. Joseph, Vice President for Domestic Policy, Chamber of Commerce of the United States. I welcome this opportunity to express the Chamber's opposition to efforts to overturn legislatively the Supreme Court decision in Illinois Brick Company v. Illinois,[1] through "The Taxpayers Antitrust Enforcement Act of 1984."

Nearly seven years ago, at the very first legislative hearing on Illinois Brick, a Chamber witness testified in opposition to overturning the decision. Nothing has happened to cause us to change our position. Back in 1977, the business community's widespread support for the Supreme Court's decision was based on the expert observations of many litigation attorneys and the businesses they represented. Fairness, effective enforcement, and court time were prominent reasons for this support. Now, seven years later, the academic evidence has reinforced and confirmed the real life experiences of affected businesses.

We oppose S. 915 or any other effort to overturn the direct purchaser rule of the Supreme Court in Illinois Brick. The Supreme Court recognized that direct purchasers are best able to uncover improper conduct, bring the action and prove the violations. We further agree with the Court that if this right of action were extended to remote purchasers, it would complicate the litigation, if not actually inhibit it: complicate it because of the difficulty of showing when overcharges were "passed through" the distribution chain; inhibit it, not only because of the complications involved in "pass through," but also because of the obstacles placed on ultimate recovery by the direct purchaser.

Unfortunately, the 1984 proposal, as all prior proposals, does not solve the problems which are inherent in any determination of whether overcharges have been "passed through" the system.

Realistically, this proposal would mean that most direct purchaser lawsuits would include issues of "pass through." After all, most products end up in consumer hands in one form or another.

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[1] 431 U.S. 720 (1977)

Moreover, we see very little difference between proposals of the past and the current bill with respect to promoting:

-Indirect purchaser actions by states in their proprietary capacities;
-Consumer class actions (parens patriae cases) by the states; and,
-Indirect purchaser actions by the federal government in its proprietary capacity.

Simply because with the states are in a parens patriae posture, this would not alleviate all the problems of showing "pass through." Basically, the only difference is the substitution of the state as an artificial plaintiff.

But, with the states poised to take a more active role in these cases, a very real new problem could arise. Imagine the problems if the state were acting as a parens patriae plaintiff on one hand and in its own behalf as a proprietary plaintiff on the other. Conceivably, the situation could arise where the state was litigating the pass through issue against itself. The potential for confusion is enormous and would likely discourage direct purchaser suits.

The primary goal of antitrust actions for damages is deterrence, and deterrence is greater when direct purchasers are relied on as the principal source of private enforcement. They have the most incentive; their claims are usually large; they are in the best position to detect violations; and their chances of recovering undiluted awards are greater.

Passage of S. 915 to promote actions on behalf of remote purchasers would seriously weaken this direct purchaser incentive, and overall enforcement would suffer in the process. Very probably, lawyers for remote buyers would bring suits only in the more highly publicized and flagrant cases. Since they do not deal directly with alleged violators, remote buyers -- and the lawyers acting on their behalf -- would have little chance of detecting and proving lesser violations.

The discouraging impact of these proposals is obvious. Not only would direct purchasers be faced with actions by the state as indirect purchaser, but this proposal would require direct purchasers to prove the absence of "pass on." For a direct purchaser, an indirect purchaser action would result, in effect, in two trials, — first the alleged antitrust violation, and, second then the defense of the alleged "pass on."

There is simply no justification for complicating antitrust enforcement in this way. This bill would not be any more "fair" than the Illinois Brick rule because it would also deny recovery altogether to whole classes of persons who may have been hurt. Direct purchasers, who suffer the most immediate impact and who are in the best position to detect and prosecute claims, would face the staggering burden of proving no pass through.

But even conceding an infallible capacity for detection by lawyers acting for indirect purchasers, enforcement would still suffer. Consumer class actions, for example, would likely crumble under the difficulties of proving and allocating "pass on" of overcharges through complex distribution chains. This point was made repeatedly in past hearings, and was alluded to by the Supreme Court in the Illinois Brick decision. At one point, the Court said:

> However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble damage suits and seriously undermine their effectiveness.

Nothing has occurred to make the problem any more manageable today than it was when confronted by the Court in 1977. Nor can it be said that actions brought by public officials instead of by private parties would in any way improve the situation.

Conclusion

In looking at damage action enforcement, Congress is obligated to balance the interests of defending businesses, consumers and the courts, as well as the remedies given to plaintiffs. This proposal, unfortunately, fails to develop or fully consider this clear need for balance.

For defending business firms, the bill would aggravate the already intolerable atmosphere of intimidation caused by unlimited class action demands.

For consumers, the bill would remove the certainty of effective and fair long-range deterrence, and would substitute short-term promises of small payments for injuries caused by alleged violations.

For the courts, it would compel the unraveling of impossibly complex factual situations, such as those described in the Illinois Brick decision.

The direct purchaser rule takes into account all of these problems and should be retained. Measures to overturn the rule, such as S. 915, should be rejected.

Senator **Grassley**. The last witness this morning is a constituent of mine from the State of Iowa, Glenn Freie. He is chairman of the Meat Price Investigators Association. His home is in Latimer, IA.

The association is concerned with problems related to beef and agricultural product marketing, and Glenn has also been in agriculture his entire life.

I want to say, Glenn, I know that you have been working on the Hill in this area for the last 7 or 8 years, and both as a Member of the House of Representatives and now as a Member of the Senate, I have had an opportunity to follow the skill with which you have operated in this area.

I also want to say that you have established a reputation as a person who does not give up and I very much appreciate that.

STATEMENT OF GLENN FREIE, CHAIRMAN, MEAT PRICE INVESTIGATORS ASSOCIATION

Mr. **Freie**. Thank you, Senator. I feel a little bit like a neighbor lady who went to the bathroom in a public building in our area the other day. She had something else on her mind and she went in the bathroom and sat down on the throne. Then all at once she heard some people come in they were men's voices. She realized that she went in the wrong place, and I kind of feel today that that is where I am at with the other distinguished people that have been testifying here.

Again, I am no antitrust expert, but I have been at this pursuit since 1978, trying to address a problem that faces sellers of agricultural products. So I am here today in a two fold role.

One, I want to speak to you about my support for S. 915, but I want to offer an amendment that I think is critically needed at this time in the history of America. I think that probably most of us in this room are aware of the critical condition that agriculture is in today.

Also, I think that this is important not only to producers of agricultural products, but to the consuming public as well because I believe that in the next few years—and I think in the next 2, 3, or 4 years—that the structure of agriculture is going to be determined by the efforts of you and me and other people who are interested in it.

We hear all the rules and reasons why agriculture is in trouble, and they tell me that it is high interest rates and it is overproduction and we have a high dollar value; the dollar value in currency is high and we cannot import and export like we should.

But I believe that over 50 percent of the problems that we as agricultural producers face today stem from the fact that we are selling into a market which is being controlled by monopolists.

I believe that if I were given access to the court system that I could show that we have been underpaid over the past 15 or 18 years on the crops that we produce in the State of Iowa, such as corn, soybeans, oats, cattle, sheep, and so forth, and we have been underpaid at least 15 percent.

If you look at the total revenue developed from these crops in the Nation in 1980, 1981, 1982, and January 1983, you will find out that in rounded figures it is about $250 billion.

Now, let us just take if the fact were true that we were underpaid 10 percent. That comes in my calculation to about $25 billion that could have been fed into agriculture, and look at the difference that that would have made in agriculture, and look at the participants that would have been allowed to stay in agriculture. Look at the effect it would have on the competitive market for the production of foodstuffs, which is very vital to every person in these United States.

I think that it is an issue that we have got to address today. How and who do we want to produce the foodstuffs that are vital to everybody in this country? So today I would like to offer an amendment. The amendment is called the Agricultural Producers Antitrust Access Act, and I am trying to hurry along here, Senator, so if I talk too fast you will have to slow me down.

The act is meant to give the indirect sellers of agricultural products—and we have got them listed as cattle, hogs, sheep, grains, and soybeans—to give them access to the court system under the antitrust laws, whether or not they be an indirect or a direct seller.

We think that this carries a special meaning and that this is a whole set of circumstances different that we ought to address in agriculture. Now, we say that everybody ought to have the right, but we have pared down the number of participants. I will read you what the amendment says; I think it would be the fastest way to do it.

It says:

> An action under section 4, 4(a) or 4(c) for damages resulting from any underpayment received on the sale of cattle, hogs, sheep, grains, or soybeans shall not be barred because the person seeking such damages is not a direct seller to the defendant, provided, however, that the person seeking such damages must have possessed the livestock or grain product for feeding or growing purposes for at least 21 days prior to sale.

One of the objections that has been raised all the time in the pursuit of *Illinois Brick* and *Hanover Shoe* and the question of whether we ought to overrule them is that there are too many links in the chain to decide who suffered what damages.

So in the production of foodstuffs and to assure that we end up with a competitive agriculture, we have pared this down so that there are very few participants who could have the right to go into the court systems and pursue the problems that we believe are in the marketplace today.

We then under the next section—and I will read it:

> Under sections 4, 4(a), or 4(c), for damages resulting from any underpayment received on the sale of cattle, hogs, sheep, grains, or soybeans, or the sale of products processed therefrom, the person seeking such damages shall not recover for any amount of an underpayment that has been passed on to others who themselves are entitled to recover damages for such underpayment under this section.

We are very conscious, and we as producers in no way would ever be found guilty of having incurred on somebody double damages or recovery twice from the same incident that we are addressing.

We are open to suggestions if this does not speak to that problem, but what we have done in this amendment is we have outlawed *Hanover Shoe* and *Illinois Brick* for this particular amendment itself. And we have tried very hard to make sure that nobody ever has to pay double recovery on any of these items.

Now, because the time is limited, I want to speak just to two other items. You know how we farm boys are; we get in the city and we do not know when to shut up. But one of the things I have heard over all these years is that the direct party is the one to bring the suit, and I have heard it this morning again.

I have heard it said that there have been studies done to show that the direct party generally does that, but I want to show you an example in our case to show you that it does not work and the effect that it has had on agriculture.

We have what they call the beef litigation where we have filed an action against the retailers for price fixing. *Illinois Brick* came along and, of course, they tossed us out of court. We spent 5 years going up and down the court systems to try to come under an exception to *Illinois Brick* which said that if you could prove that the underpayment is passed down strictly straight down to you without any alternation, you have the right to go back in the court system.

My time might be off a little bit, but about 2 years ago the defendants filed a motion for summary judgment and in their behalf they went out and secured affidavits from, I think, 25 or 30 of the largest packers in the United States. In them, these packers stated that what the defendants were charging—the price they paid for carcass beef was not passed down directly.

They got these affidavits to back up that statement, and they are on record and in the file and you can go in the court system and look at them. But is it not interesting that at about the same time period, a research study done by the U.S. Department of Agriculture with some of the very same packers—these packers say the opposite of what they put in those affidavits.

So my point here is that they are scared of retaliation and I have had many of them tell me that they are scared of retaliation, and that no way in the world are they going to bring a suit to address this problem of monopoly that occurs in the purchase of carcass beef.

I think it is a prime example of where the direct party does not dare to sue and does not want to hurt his relationship with the packers.

One other thing before I close, and I realize you people have to go. The proponents of the legislation have always said that the Justice Department is the arm that ought to pursue the problems that we as cattlemen face.

You know, there have been many studies done and interviews done in 1979 with many people who were members of the Justice Department, and I am talking about the employees, corporate lawyers, and people who deal with it.

The man who did it was a man with the New York Times by the name of Paul Taubman; T-a-u-b-m-a-n I think is his name. A large share of the people he interviewed in the Justice Department said that the Justice Department does not have the manpower, the finances or the desire to pursue these kinds of actions.

Another thing the Justice Department did about 2 years ago is they had a study conducted with retired executives of large Fortune 500 corporation companies to try to determine what would be the greatest deterrent to price fixing by large corporations, and they stated two things.

One, they stated continued, heavy enforcement by the Justice Department, but they also said that the greatest deterrent to price-fixing in America is the damage suits that result from private actions.

So, due to time I am going to discontinue and I am going to submit my statement for the record. I would like to make a notation that on page 24, due to typist errors, it should read—instead of "packers," it should read "retailers." And in one place, instead of "middlemen," it should read "cattlemen."

I had this done last Monday and Tuesday, a week ago, and I went back to my farm to put my corn in that soggy Iowa soil that we have, and I had no chance to see this until Tuesday, yesterday.

I would ask permission to submit corrections on that because there was a typist's error and I have had no chance to check it.

Senator GRASSLEY. That will be fine.

[The prepared statement follows:]

PREPARED STATEMENT OF GLENN FREIE

My name is Glenn Freie. I am a farmer and livestock producer from Latimer, Iowa. I am appearing before this Committee in my capacity as chairman of Meat Price Investigators Association, a trust and unincorporated association representing approximately 500 cattlemen in 14 states, to introduce and support a Bill to amend the Clayton Act (15 U.S.C. § 12 et seq.).

The proposed legislation reads as follows:

A BILL

To amend the Clayton Act to allow certain sellers of agricultural products to bring antitrust actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This Act may be cited as the "Agricultural Producers Antitrust Access Act".

SECTION 2. The Clayton Act (15 U.S.C. § 12 et seq.) is amended by inserting after Section 4H the following new section:

> "SECTION 4I(a). An action under Sections 4, 4A or 4C for damages resulting from any underpayment received on the sale of cattle, hogs, sheep, grains or soybeans shall not be barred because the person seeking such damages is not a direct seller to the defendant, provided, however, the person seeking such damages must have possessed the livestock or grain plant for feeding or growing purposes for at least 21 days prior to sale.
>
> (b) In any action under Sections 4, 4A, or 4C for damages resulting from any underpayment received on the sale of cattle, hogs, sheep, grains or soybeans, or the sale of products processed therefrom, the person seeking such damages shall not recover for any amount of an underpayment that has been passed on to others, who themselves are entitled to recover damages for such underpayment under Sections 4, 4A, or 4C."

SECTION 3. The amendments made by this Act shall become effective upon the date of the enactment of this Act.

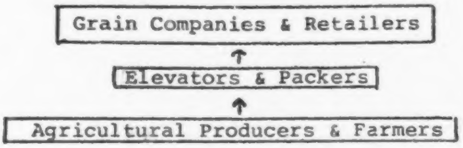
The purpose of the proposed legislation is to provide agricultural producers with the ability to recover for damages suffered at the hands of antitrust violators. In effect, the Bill would reverse the impact of the Supreme Court's holding in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), in that agricultural producers, who may be considered "indirect sellers", may recover for injuries suffered through unlawful practices, such as price fixing, exercised by those who purchase their products. This amendment differs from previous attempts to legislatively overrule Illinois Brick (S. 1874 - a 1978 bill to restore effective enforcement of the antitrust laws by amending § 4 of the Clayton Act by inserting the words, "in fact, directly or indirectly," immediately after the word, "injured", and S. 300 - the Antitrust Enforcement Act of 1979) in that it is limited in application to producers of cattle, hogs, sheep, grains and soybeans who have had possession of same for 21 days or more. The proposed legislation herein also limits the amount of recovery available to the agricultural producers.

It has long been recognized that agricultural producers occupy an extremely important and unique position in the United States and world economy. In fact, the Antitrust laws were historically developed as a device to protect such agricultural producers from the manipulation of powerful industries, such as railroads.

Following the Civil War, the West and South experienced growing unrest among the agricultural community. The unreasonable railroad rate structure was a primary cause of this growing political unrest since the farmers were largely dependent upon the railroads for the transportation of their produce. Additionally, the railroads frequently entered into combinations with the warehouses on which the farmers had to rely for storage of their produce. Such combinations enabled the warehouses and railroads to charge extortionate rates. See D. C. Cloud, Monopolies and the People 136 (1873); Henry D. Lloyd, Wealth Against Commonwealth 5, 31 (1894). In response to these coercive and extortionate practices, the farmers united politically, in what is commonly known as the Granger Movement, in an attempt to use their collective influence on lawmakers to produce legislation curbing the power of railroad trusts.

Although the Granger Movement was not as effective as was hoped in the regulation of railroads and promotion of farmers cooperatives, it did lay the foundation for the development of political organizations representing farm groups. In 1889, a Farmer's Congress met in Montgomery, Alabama, and as its first resolution stated the farmers' opposition to all combinations of capital to "arbitrarily control the markets of the country to the detriment of our productive industries." The Granger Movement also served as a forerunner to the Progressive Movement which advocated distrust for big business and its exploitation of not only farmers, but also working class and consumers and served as impetus to much of the present-day antitrust legislation in the Sherman and Clayton Acts. See Solon J. Buck, The Granger Movement 26 (1913).

It thus seems clear that the federal antitrust statutes were designed to ensure that the farmers in the agricultural sector received fair prices which were governed by the market and not dictated by powerful economic concerns. This legislation was of fundamental importance to the agricultural community, more so than any other industry, because of the farmers' dependence upon the railroads and warehouses in selling their commodities. In fact, the chains of distribution for agricultural products and livestock have been generally structured as follows:



The agricultural producers are clearly dependent upon the large grain companies and retailers for the production of income and it has been recognized that exploitation of this economic interdependence to maximize profits at the expense of the agricultural producer in the form of depressed prices for produce, spurred Congressional action in the area of monopoly regulation. In doing so, Congress recognized a disparity between the prices paid by the consumers for commodities and the depressed prices received by the farmers for those commodities. The cause of this price disparity was clearly the economic power wielded by the elevators, packers, grain companies and retailers and the "effect" artificially depressed farm prices.

The antitrust lawsuits mentioned earlier suggest that there are still significant antitrust problems in markets for agricultural products that the Illinois Brick rule will very likely result in conditions getting worse. Similar to the problems faced in the late 1800's, agricultural producers today are in a state of unrest. Currently, farmers and cattlemen face economically powerful middlemen and chain store retailers in the food distribution chain. Farmers and cattlemen cannot market their products directly to consumers so powerful middlemen and retailers are able to dictate "take-it-or-leave-it" prices to producers.

The irony of the Court's decision in Illinois Brick is that the rule extends judicial protection to the very activities in agricultural markets which Congress set out to prevent in the late 1800's. History has shown that Congress desired to protect agricultural markets from anticompetitive activities, and legislation should be enacted to exempt the agricultural community from the Illinois Brick rule. In this way, Congress will return to the original intent and purpose behind much of the federal antitrust statutes and their harmonious relationship to the agricultural sector.

The need for this amendment seems clear, especially when one notes the essential factor of the agricultural producers' susceptible positions in the marketplace, subject to the whims of parties at different levels in the market. Large corporations are placing themselves in an intermediate and important position in the chain of production and distribution. They purchase large quantities of raw materials and agricultural products, perhaps transforming them into some secondary form, and offer the products for sale to customers. Because of the agricultural producers' unique and highly susceptible positions, and the formidable economic power possessed by the intermediary firms, the firms are able to obtain large profits by maintaining low prices paid to sellers for the produce and by establishing high resale prices to the consumers of the product. A primary reason for the passage of the Sherman Act in 1890 was to protect producers, especially agricultural producers, from monopolies and price-fixing combinations that would prevent them from receiving a fair price for their products. 21 Cong. Record 4098 (1890). It is obvious that today's agricultural producers deserve to receive their just compensation and/or obtain their just remedy in the courts. One of the principal reasons for the proposed legislation, therefore, is the need to protect certain markets, predominated by producers or sellers of agricultural products and other raw materials which are incorporated into the production of vital goods. Again, the importance of these goods cannot be understated; they form the nucleus of commerce, productivity, and adequate living standards in the United States.

The agricultural cooperative exemption to the antitrust laws recognizes the inherently weak bargaining position of agricultural producers (sellers) for protection from the predatory and monopoly power of middleman distributors.

If the primary producer of agricultural products is not allowed access to the courts under the Sherman and Clayton Acts, the problems that our country faced with the banks, the railroads, grain companies and meat packers in the late 1800's and early 1900's will be dwarfed by the problems that the consumers of America are facing and will face in the future. The leaders of Congress in the late 1800's and early 1900's saw the need then for some kind of action. If we believe that it is necessary to preserve competition in the food industry so that all members of our society can afford it, action needs to be taken today.

There has been the statement made that providing agricultural producers/"indirect sellers" with standing in the courts to recover damages for injuries sustained due to antitrust violations would result in increased prices to consumers. Such an assertion is inaccurate and not a sufficient basis for denying their claims. First of all, agricultural producers do not seek to increase the cost to consumers. The agricultural producers are merely seeking to receive the fair value for their products. Further, a prohibition against indirect seller-producer suits would be no assurance of lower consumer prices, as a combination or monopoly with power to push prices down to the producer also usually possesses power to raise prices to the consumer.

The preceding sections have demonstrated that Congress has historically been very interested in protecting agricultural markets from anticompetitive behavior, and, indeed, the history of the Sherman Act suggests that the political currents resulting in that legislation had their origin in monopolistic abuses practiced against farmers and cattlemen. Moreover, those problems are still recurring in various agricultural markets -- like beef and grains -- and producers of those products and the ultimate consumers of the products have been suffering the effects of anticompetitive and monopolistic conduct. Therefore, there is a need for the proposed legislation.

Since the early 1970's many cattlemen have suffered financial losses because of extremely low cattle prices. To cover their losses, many of the cattlemen borrowed against their land and are now faced with threats of foreclosure.

The declining ability of many producers to generate enough of an annual profit from their oprations, to keep them viable, is arguably due to the monopolistic elements of the marketplace.

In 1978 and 1979 I testified before this same Committee and stated that unless we, as cattlemen, were allowed to seek a solution to our marketing problems by way of the courts, many cattlemen would continue to be forced out of business.

At that time I quoted some statements from the annual meeting of the National Association of Food Chains that was held in Chicago. Calling for a counterattack on farm organizations fighting to get a fair share of the food dollar for the man who produces it, Clarence G. Adamy, executive vice president of the national chain store group, said flatly, in his October speech, "I do not believe this (the idea that agriculture is the province of family farmers) to be a sensible goal for mid-twentieth century American farm policy. Not only that, but I am opposed to the maintenance of the family farm."[1]

I also testified at that time that one of the main causes of the cattlemen's continued loss in the feeding of cattle was due to the retail chain grocery stores' ability to artificially depress the wholesale price of beef. This theory was also alluded to by Gene Futrell, Economist at Iowa State University, when he stated:

> Low prices tend to coincide with wide beef margins. The nearly 13% per lb. increase in the margin from April to July is the equivalent of more than $5 per cwt. change in live cattle prices. "In other words, over $5 per cwt. of the decline in cattle prices since April is explainable by the widening of the beef margin," he said.[2]

Another example of the monopolistic character of the grain market is reflected in the ability of the large grain companies to establish the market price of grain. The following are some instances of that price-establishing ability:

> In 1976 Canada had a bumper harvest of 20 million tons of wheat. The Canadian Wheat Board . . . offered to sell its excess harvest at $135 a ton. The big grain companies snapped up the cheap wheat and, by keeping the purchase a secret, were able to locate buyers abroad and cover themselves in the American market for wheat futures on what they could not sell.
>
> Minnesota farmers were the first to feel the effects of this deal when the Minneapolis exchange price for wheat suddenly and mysteriously collapsed as the big grain companies stopped buying the more expensive American wheat. . . . The big grain

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[1] Cervi's Journal, Nov. 11, 1964

A large part of the October meeting of chain stores was taken up with means and methods of countering, if not subverting, the investigation soon to be launched by the joint presidential-congressional National Commission of Food Marketing.

Speaker after speaker raised warning signals of unconscionable evidence that could come to light if the National Commission is diligent in examining supermarket buying practices that by their nature and trend bring charges of illegal price-fixing and restraint of competition.

[2] Western Livestock Journal, 1983

Futrell said farm-to-retail margins have followed a fairly consistent seasonal pattern during the past three years, narrowing in late winter-early spring and widening in summer and fall. "While reasons for this pattern are not clear," he said, "changes in the farm-to-retail margin have had a major impact on cattle prices."

> companies sold the cheap grain abroad at a substantial profit, liquidated their futures contracts at their higher price before the news broke in October, and then rebuilt supplies at the new far lower prices.[3]
>
> The Russian grain deal of 1972 was a bitter lesson for farmers in precisely this regard. A few of the largest grain companies had secretly arranged huge sales to the Soviet Union, then bought enough grain to cover these sales before farmers were aware of the new demand and before prices went up.[4]
>
> In May of 1980, the grain trade's fortune and the farmers' losses were just too obvious. The GAO blew the whistle, and the Des Moines Register headlined, "Embargo Compensation Payments Seen Giving Grain Firms a Profit." Members of Congress became alarmed, and Representative Glenn English, after conferring with the GAO auditors, exclaimed, "The situation smells to high heaven. The grain companies have really taken them (the USDA) for a ride."[5]
>
> Even though the major grain traders are largely dependent on U.S. farmers and U.S. resources, they are virtually unaccountable to either. The grain traders operate in an arcane and secretive world that makes them immune to many U.S. laws.[6]

The true significance of heavy industry concentration, such as in the grain industry, can be observed only when surveying the market conduct of the oligopolies. The leading result of increased concentration is greater industry reliance on explicit and tacit collusion and price fixing. In 1980, ten firms accounted for 63% of the steer and heifer slaughter market throughout the United States. These ten firms slaughtered 25% of the cows and bulls, 57% of the calves and 58% of the hogs in the U.S. market. Thus, a handful of firms are responsible for the majority of red meat produced in America. These data confirm the trend toward increasing concentration of economic power uncovered by the Small Business Committee studies and hearings by the House of Representatives in 1979 and 1980. Most striking is the concentration of power in the boxed beef segment of the industry, which accounted for 49% of the 1980 steer and heifer slaughter and represents the major flow of fresh beef to retail groceries. In this mainstream the top four firms controlled 61% of the 1980 production, while the top 10 firms controlled 81 percent. Thus, decisions about how much meat to supply to the American public, what prices to charge, and what quality to strive for now realistically rests with a relatively small number of firms. Econometric analysis has shown that at the retail level, the direct impact of increasing concentration among steer and heifer slaughters has raised the average retail beef prices by 25.1 cents per pound over the period 1969 to 1978, or 30 percent of the total retail beef price increase during the period.

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[3] Trading the Future, 1983, pp. 97, 98.

[4] Trading the Future, 1983, p. 99.

[5] Trading the Future, 1983, p. 103.

[6] Trading the Future, 1983, p. 111.

In an address before the American Agricultural Economics Association, Willard F. Mueller, a Research professor in the Department of Agricultural Economics and Law at the University of Wisconsin, also commented on the economic power in the hands of certain powerful members of the food industry. He states that:

> . . . the cumulative finding of a series of studies using alternative techniques and bodies of data confirms that the food industries with high concentration possess substantial control over price and other dimensions of industrial performance.
>
> The evidence shows that high market concentration accompanied by significant entry barriers enhances both prices and profits. Because their prices are elevated more than their profits, the most powerful firms in an industry appear to have higher costs as well. The resulting monopoly profits and consumer overcharge measure only part of the fruits of market power.[7]

In addition, a fairly recent press release by the U.S. Department of Agriculture concluded that producers of the nation's food are efficient in the production of raw materials, but the efficiency is lost between the producer and consumer. The conclusion of this study coincides with the findings of Dr. Mueller's work that the most powerful firms in highly concentrated industries appeal to have higher costs as well.

The statement has been made that the profits of packers and retailers together do not account for 2 cents out of each food dollar, and that net earnings as a percent of total sales are only about 1 percent in the packing industry and less than 1 percent in food retailing. However, it is generally accepted in the business world that companies' true net profits are judged by the percentage of return on investment capital. In the case of the food industry returns on investment capital of the top retailers, the true net profits would have to be judged by the 18-23 percentage return on investment capital experienced in the last few years.

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[7] Monopoly in the Food System, Dec. 1983, p. 856.

It has been charged by the opponents of an amendment to the Clayton Act, which would allow sellers of agricultural products to bring antitrust action, that there is no need for private right of action because of the jurisdiction of the Justice Department. However, due to lack of time, funding and staff, it is my belief that there is a need for alternate means of enforcement of the antitrust laws. Since the Department of Justice just is not able to be the rigorous enforcer of the antitrust laws, this legislation is needed to demonstrate that the government process will provide a responsive mechanism for adequate redress from practices in violation of the antitrust laws.

Philip Taubman of the New York Times conducted an interview of top government officials from the Securities and Exchange Commission, Department of Energy, EPA and the IRS, among others. The interview covered the Justice Department's efforts to successfully investigate and prosecute white collar and corporate crime in 1979. As a result of the interview, it was learned that government experts estimate violations of antitrust, tax, fraud, bribery, pollution and other federal laws by the nation's thousand largest corporations cost the economy billions of dollars a year. According to a score of current and former Justice Department officials and corporation lawyers, the Justice Department still lacks the manpower, the expertise, and in some cases, the motivation to conduct successful criminal investigations and prosecutions against the major corporations or their top executives. For example, the Securities and Exchange Commission has referred 420 cases involving questionable domestic and foreign corporate payments by major corporations to the Justice Department in recent years. Of those 420 cases, only 10 resulted in guilty pleas, and the rest have been dropped.

No corporate executives have been prosecuted individually, although many were named in the SEC files.

In research conducted by Marshall B. Clinard of the Justice Department, and entitled, Corporate Ethics and Crime, three out of four of the retired mid-level corporate executives who took part in the study said, "American industry cannot police itself and therefore must be regulated by government."

> According to several executives, the ethical patterns within a corporation or within an industry were improved and maintained where the government had taken strong enforcement actions in the past. A number of them, for example, pointed out the continuing effects of price-fixing and antimonopoly enforcement actions brought by the government years ago. Support for this view comes from a study of criminal antitrust prosecutions in the bread industry which had significant subsequent deterrent effects on price-fixing (Block et al., 1981). The degree of deterrence was surprising in that none of the executives went to jail. In this case, deterrence was strengthened by private civil damage suits that followed in the wake of criminal prosecution. Moreover, prior enforcement actions, according to the executives, had not only affected compliance in the particular area in which they were brought, but also had tended to affect compliance with government regulations generally. Surveying the evidence, two writers in the area of corporate crime have concluded that deterrence is quite effective, particularly with specific corporations or in the case of executives who have been prosecuted successfully. (Braithwaite and Geis, 1982).[8]

Finally, even when the Justice Department undertakes an investigation into an antitrust case, developments after the investigation might oftentimes contradict the results of the investigation. For example, the Justice Department investigation of the Bray antitrust case found that the plaintiffs' case therein was "full of holes". Subsequent to that investigation it was learned that although there may not have been sufficient evidence in the trial record, there was, in fact, substantial evidence of the antitrust violations, substantial enough to support a malpractice award. The problem in that case was that the plaintiffs' counsel failed to introduce the evidence of such violations. See New West, September 8, 1980.

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[8] CORPORATE ETHICS AND CRIME, 1983, pp. 157 and 158 (This document is the result of research supported by Grant Number 81-IJ-CX-0035 awarded by the National Institute of Justice, U.S. Department of Justice under the Justice System Improvement Act of 1979.)

Thus, it seems clear that as the Justice Department cannot adequately police every economic industry, the proposed legislation is necessary to provide a continued deterrent to the violation of the antitrust laws.

As a long-time advocate of legislation to retroactively reverse the effects of the Supreme Court's holding in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), I have been aware of the problems incurred by and the objections that have been continually raised against such legislation.

The legislation proposed herewith addresses two problems. First, this Bill is intended to reassert the original intent and purpose behind much of the federal antitrust statutes and insure their harmonious relationship to the agricultural sector. Secondly, the intention of this Bill is not only to provide agricultural producers with the ability to recover damages but also to limit that recovery so that any potential defendant will not unduly suffer under the antitrust treble damage provisions providing that the defendant's same conduct has been subject to previous antitrust litigation in which damages were awarded.

The major intent of this Bill is to reassert the right of sellers who actually grow grain or raise livestock, to sue for damages under the Sherman and Clayton Acts, persons above them in the chain of distribution who fix an artificially low price for the commodity, irrespective of whether the price fixer bought directly from the producer. Producers of these grains and livestock are defined as those persons who have possessed the grain-producing plants or raised and fed the livestock for more than 21 days previous to sale. Thus, the persons who would benefit from this Bill can be characterized as farmers, ranchers, and feeders who have contributed a large, long-term investment in land, plant, equipment and inventory needed to produce the commodity. Such persons are quite helpless against "upstream" price-fixing activities because of the long lead times between the decisions to raise the commodity and the time of sale.

Further, these persons are generally in no position not to sell, in spite of low prices because of the perishable nature of the produce, the expense of long-term storage and the short-term need for cash in the agricultural sector to sustain their capital-intensive businesses. Contrary to the position of the purchaser of priced fixed goods, who can exercise the election not to buy, these agricultural producers face a "no-win" situation which offers no choice but to sell.

Short-term holders of these commodities or middlemen processors are not in the same category, either because they are generally part of the mechanism that passes the price "undercharges" down to the producer or because they are less vulnerable to price swings due to the short-term nature of their investment. Further, middlemen processors are not vulnerable to the radical changes in production costs experienced by the primary producer. Finally, the middleman processor of agricultural commodities is more likely to experience close, long-term business relationships with "upstream" price-fixers. This occurrence makes the chances substantially unlikely that middlemen would sue for damages caused by price-fixing. In fact, in recent cases brought by producers against "upstream" price-fixers, the middleman has consistently chosen not to sue. Therefore, there is the need for the private antitrust actions to continue to police the agricultural marketplace. In fact, Assistant Attorney General John Shenefield has testified in prior hearings that many times direct purchasers will not sue simply because it jeopardizes critical supply relationships and in those cases, the individual parties are the only real plaintiffs to challenge. Hearings on Antitrust Enforcement Act of 1979, S. 300, Serial No. 96-2, p. 13. Shenefield also stated that as corporate decisions depend on the net dollar and cent resolution of any particular problem, the treble damages available in private antitrust litigation serve as a much more effective deterrent than criminal sanctions that may be imposed. Hearings on Antitrust Enforcement Act of 1979, S. 300, Serial No. 96-2, p. 12. Further, as the Congressional intent throughout the history of the antitrust laws has been based on the objectives to (1) compensate those truly injured and (2) act as a strong deterrent to commissions of such violations in the future, it is clear that there is the need for the legislative repeal of Illinois Brick.

Among the primary objections raised against such legislation are the following alleged problems:

1. The problem of increased litigation that would result if agricultural producers/"indirect sellers" were allowed to sue for violations of the antitrust laws and the assertion that the addition of the agricultural producers/"indirect sellers" as plaintiffs would intensify the already complex litigation in the antitrust arena;
2. The problem of the potential duplicative recovery and aggregate damages that might be assessed against the antitrust defendant;
3. The problem of tracing the injury back to the indirect seller and proving the amount of damages actually sustained; and
4. The problem alleged that most indirect parties do not claim their shares of recovery via antitrust actions.

In response to the first objection noted above, it is sufficient to say that the mere possibility of increased litigation and the increased complexity of litigation due to the pursuit of recognized legal remedies by injured parties should not serve as a basis for denying their recovery. Congressional intent has clearly been to provide parties injured by antitrust violations with a forum in which to recover their damages. In fact, Congress' recent legislation, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 was adopted to provide indirect parties with an effective and efficient "mechanism to permit them to recover damages by giving State attorneys a general cause of action [to sue as parens patriae on behalf of the States' citizens] against antitrust violators." S. Rep. No. 94-803, p. 6 (1976)[cited in Illinois Brick Co. v. Illinois, 431 U.S. 720, 756 (1977)(Brennan, J., dissenting).] Another Congressional objective provides support for the indirect party suit in that such suits play a paramount role as ever-present threats to deter "persons" contemplating business behavior in violation of antitrust laws. Id. at 755, citing Perma Life

Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968).

As for the problem of potential duplicative recovery and aggregate damages being assessed against the antitrust defendant, the proposed legislation acts itself to dispell this justifiable concern.

The amendment states that an agricultural producer plaintiff's recovery shall be limited to actual damages attributable to overcharges or underpayments where the plaintiff's recovery duplicates damages awarded as part of a final judgment in a prior antitrust action based upon the same conduct of the same defendants. The burden is on the defendant to show by clear and convincing proof that the duplicative damages have been awarded and that those damages relate to precisely the same transactions which are at issue in the subsequent case. The burden should not be on the plaintiff to show the absence of such a duplicative recovery and the defendant should not be deemed to have carried its burden unless it shows with specificity that it has already paid damages as to those particular goods or transactions which are at issue in the subsequent case.

In reviewing that proof offered by the defendant, the court should give a great deal of consideration to the judgment to ensure that the recovery of damages in the previous action is not a sham or a contrivance to avoid treble damage recovery.

If there has been no prior judgment meeting the aforementioned criteria, then the plaintiff producer would be permitted the normal treble damage recovery as provided in the Clayton Act. Clearly, the intent and effect of Sec. 2 of the Amenement, to permit recovery by certain agricultural producers but also to avoid the onerous nature of a duplicative treble recovery, should satisfy any objection raised on the matter of duplicative recovery.

The third objection, that there will be difficulty in tracing the injury back to the agricultural producer seller and proving the amount of damages actually sustained, is contrary to the established case law. "Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of plaintiff's rights."

Illinois Brick Co. v. Illinois, 431 U.S. at 756 (Brennan, J., dissenting), citing Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265-66 (1946); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968); and Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961), which emphasized that to plead a cause of action under section 4 "allegations adequate to show a violation and . . . that plaintiff was damaged thereby are all that law requires." Additionally, it can be noted that it is not all that difficult to trace the price cuts from the retailers and grain companies, through the middlemen to the agricultural producers of livestock and grain and no more complicated. Once the plaintiff has established his injury and the source of such injury, he clearly should not be denied recovery.

The final objection raised by the opponents of prior legislative attempts to reverse the effect of Illinois Brick and Hanover Shoe rests on the assertion that most indirect parties do not claim their shares of recovery via antitrust actions. As a footnote to this objection the opponents suggest that the middlemen/direct purchasers (or the grain elevators and packers in the schematic representation of distribution chain in agricultural products industry) would be the party most capable and interested in bringing the action against the antitrust violator. Both reasons for this objection are unfounded.

First of all, the assertion that most indirect parties do not seek to recover their share of damages in antitrust actions may be factually correct, but it fails to address the reasons for such lack of involvement. The very fact that antitrust violations have occurred serve as an explanation for the lack of involvement. Insufficient market information to the agricultural producer results from the withholding of such information by the organizations and parties (and arguably unlawful combinations which act to depress agricultural product prices to the producers) from the agricultural producers/"indirect sellers".

It seems obvious that a party would not entertain the thought of bringing a legal action if there is no information available to the party of the basis for the potential claim.[9] Also, the decision in Illinois Brick has had a recognized chilling effect on the indirect party antitrust suits.[10]

The assertion that the middlemen, the grain elevators and packers, are the parties best suited to sue for antitrust violations, such as price fixing, is equally suspect. First of all, there is no argument that indirect parties are not injured by price fixing and conspiracies to depress prices to the agricultural producers. Therefore, once the injury is shown, and is causally connected to the antitrust violation, there should be no doubt that the indirect party has a legitimate claim and the indirect party should not be precluded from seeking redress merely because a direct party is also involved, particularly in the situation where the direct party has acted in concert with the antitrust violator. The historical reading and effect of the Illinois Brick and Hanover Shoe denial of the "pass-on" theory results in such preclusion. At this point, I would argue that the holdings in both Hanover Shoe and Illinois Brick were intended to be applied in the limited contexts in which they were rendered, i.e., suits to recover damages for antitrust violations in which the pass-on theory is asserted as a defense or offense in the case, and the indirect party and the direct party are not parties to the same action. Illinois Brick at 753 (Brennan, J., dissenting). If the holdings are limited in that context, then indirect parties would still have the access to the court necessary to redress their injuries;

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[9] Trading the Future 96 (1983).

In early April 1979, for instance, a few of the large grain companies made corn sales amounting to 170 million bushels (at least 110 million of which were to foreign buyers). Word of the new sales did not reach the market until late April, after the grain companies had been able to accumulate corn stocks in excess of what was needed to meet their commitments. When news of the corn demand finally hit the market, prices rose 4 to 10 cents a bushel and the grain companies were able to sell off their supplies at a handsome profit.

[10] Statement by John Shenefield, Assistant Attorney General, recorded in Hearings Report on Antitrust Enforcement Act of 1979, S. 300, Serial No. 96-2, pp. 12, 24-27.

Noted that nearly 50% of antitrust enforcement may have been wiped out by Illinois Brick and the indirect parties may have been scared away by Illinois Brick.

of course, this would perhaps place the burden of joinder on the indirect party, but such would generally not be an undue burden since they are fully aware of the direct party involved.

Finally, there is little support for the statement that the direct party is the only party to pursue the legal remedies attendant to damages suffered at the hand of antitrust violators. If the opponents of this legislation contend that the indirect party has little incentive to sue, what incentive can be shown by the middleman who has passed on the damaged (decreased prices) or has acted in collusion with the antitrust violator/price fixer. In fact, the direct party may oftentimes be intimidated by a well-founded fear of economic reprisal by the powerful price fixer, such as jeopardizing their position with suppliers and/or losing their position in the distribution chain from price fixer to agricultural producer. The intimidation is very real and a case in point is found in the pending "packer" litigation, In Re Beef Industry. In that case a number of affidavits were submitted to support the Defendant-Packers' Motion for Summary Judgment. The affidavits stated, in essence, that the suggested carcass price was not "passed-down[11] to the middlemen submitting those affidavits, obviously at Defendants' request; yet when the same middlemen responded to a survey authorized by the United States Department of Agriculture to determine the sources for bid prices, those middlemen indicated that bid prices were determined based on information received reflecting wholesale or dressed beef prices."

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[11] Agricultural Information Bulletin No. 432, p. 13 (U.S.D.A. 1979), "Slaughter Cattle Pricing and Procurement Practices of Meat Packers".

Key information comes from the "National Provisioner" and to a lesser extent the "Meat Sheet." The "National Provisioner's" reported wholesale or dressed beef price for a specific SWGYG carcass serves as a starting point in arriving at orders that are given to field-level buyers for use in arriving at bids that eventually result in sales prices.

Important also are reported price differences or spreads between carcass variables. Other information from private price reporting services includes prices for competing meat products (pork and poultry). Over time head buyers learn of competitors' slaughtering and processing capacities, types of cattle purchased, and procurement areas. This enables them to identify where cattle are being shipped that are purchased by other meatpackers.

In sum, it is obvious that intimidation practices exercised by the antitrust violator would clearly decrease the incentive that any direct party may have in bringing an antitrust action, and as such, it is not always the case that the direct party would have the best and most compelling reason to sue the antitrust violator.

CONCLUSION

Again, the proposed Amendment addresses problems faced by producers of agricultural products and the recent rulings of the Supreme Court of the United States. Traditional antitrust laws have focused on price fixing and rigging of markets by sellers of goods. The situation to which this amendment is directed is the converse: a situation where there are products being sold into a fixed market. Under the antitrust laws as they exist, a plaintiff may recover his "overcharges" paid directly to a person who participates in a conspiracy to fix, stabilize or maintain prices. Under the holding in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), recovery is limited to those persons who are "direct purchasers" from conspirators.

The policy announced in Illinois Brick was decided to limit the complexities of proof which subsequently resulted from the suit by persons downstream in the chain of distributors. The theory was that part of an artificially high price could be absorbed upstream of an indirect purchaser by middlemen and that the difficulty of proof in such cases was burdensome to the administration of justice. The complexity outweighed the indirect purchaser's right to maintain an action.

With agricultural products, however, the converse of the usual antitrust circumstances exist. Instead of a few sellers and many buyers, there are literally hundreds of thousands of sellers and relatively few buyers. Instead of "overcharges" in the chain of distribution, there exists a rigged marked into which these hundreds of thousands of producers must sell at an artifically low price. And instead of conspirators receiving a "windfall" as a result of their illegal and conspiratorial activities, they merely reduce their variable costs. The effect of the conspiracy is in the market into which the products sell. Contrary to circumstances involving "overcharges", there is no apportionment problem because no "overcharge" has been paid. A "pass-on" defense in the context of a rigged market for agricultural products is a nonsequitur because such a defense would require allocation of unpaid amounts.

The problem addressed by the Supreme Court in Illinois Brick is what might be termed a "trickle down" problem; a problem of tracing the overcharge to and the overpayment by a direct purchaser through successive levels of overcharge and overpayment where, at any of the several levels, all or part of the damage suffered by reason of the payment of artificially high price might be absorbed by the payor. In the case of agricultural products sold at a conspiratorially depressed price, the producer can neither recoup nor pass on any loss suffered because he is the first seller into the rigged market. Likewise, it is not realistic to assert that a middleman might have absorbed some of the price depression. In some cases middlemen are the victims of the enormous market sources wielded by the conspirators. In any event, it is naive to think that a profit-minded middleman would attempt to counteract the effect of the conspiracy by raising his costs and paying higher prices than are established by the rigged market.

It is precisely because of the fact that the marketing of agricultural products involves the sale by many to a few that Illinois Brick and the trickle down theory are not appropriately applied to the sale of agricultural products and it is the intent of this legislation to encourage the vigorous enforcement of antitrust laws as is appropriate according to the legislative intent and judicial interpretation of the Clayton Act.

Mr. Freie. But I think that in closing, I just want to say this. To me, foodstuffs are vital to every person in these United States, and if we do not want another car industry in the production of food I think we had better take a look at who is going to participate in it.

Let me tell you that there are many people who started in 1963—and I have the evidence to prove this—who set out with the intent to eliminate the cattlemen of this country, the individual cattlemen. I told the committee this in 1978, that by the year 1984 the majority of cattlemen would be out of business or in dire financial straits, and let me tell you that that prediction has taken place.

Let me tell you that unless we are able to protect ourselves from the marketplace, the year is not too far away when we will see corporate agriculture in America.

Thank you for your time.

Senator Grassley. Thank you very much, Glenn.

Glenn is the last witness. I want to thank the audience as well as the participants at the table for their kind attention to this very important problem, and the meeting stands adjourned.

[Whereupon, at 11:13 a.m., the committee was adjourned.]

[The following statement was supplied for the record:]

STATEMENT OF CHARLES A. GRADDICK

ATTORNEY GENERAL OF ALABAMA

Mr. Chairman and Members of the Committee:

I am Charles A. Graddick,the Attorney General of the state of Alabama, and I am pleased to present to this panel my views on proposed legislation to overrule the 1977 Supreme Court decision in Illinois Brick Co. v. Illinios. I strongly support this legislation to reverse the Illinios Brick case and encourage vigorous enforcement of the the antitrust laws.

The Alabama Attorney General's Office has long been concerned with the effective enforcement of the state and federal antitrust laws. My office organized an antitrust section in 1977 and since that time has been actively involved in enforcing fair competition. Specifically, we have participated in numerous cases as a class member or party plaintiff. These cases concerned price fixing and bid rigging, the subjects of the legislation we are discussing today.

The state of Alabama and its citizens have been immediately affected by the Illinois Brick rule. The Attorney General is the chief law officer of Alabama and represents the state. Alabama, through its various departments and agencies as well as the state Finance Department, buys an enormous variety of goods. For example, the state Department of Education buys crayons and other art materials for statewide arts projects and performances. We buy medicine for our state hospitals, clothing for state prisoners and residents of institutions, and all varieties of food. The state also spends millions of dollars every year to build and maintain miles of highways and construct state buildings. Finally, the state purchases the books and paper and office equipment to run its agencies and provide necessary services to the citizens of Alabama.

However, Alabama makes most of its purchases from local sellers and contractors rather than directly from the manufacturer. I would like to point out four specific examples of the negative effects of the Illinois Brick decision on the state of Alabama. First, in the Steel Rebar Case, Alabama instituted a civil antitrust damage action, based on a federal antitrust conviction of steel rebar salesmen in the southeast, against manufacturers of steel reinforcing rods to recover losses resulting from price fixing. During the period of the alleged conspiracy, Alabama purchased millions of dollars worth of rebar materials for massive highway, bridge and tunnel construction. Despite the fact that an excessive price was paid by the state, the damage action was dismissed because

Alabama had not purchased the items directly from the guilty companies. On March 2, 1978, Judge J. Foy Guin of the Northern District of Alabama granted Summary Judgment in favor of the defendants. The defendants did not deny culpability; they denied direct sales to the state. A legislative reversal of Illinois Brick would have reversed the ruling.

In the Chicken Antitrust litigation, Alabama's share of the settlement fund was reduced as a result of the Illinois Brick decision. The fund of approximately $35,000,000 was to be divided among plaintiffs; a subclass of states originally was to share 15 percent. After Illinois Brick, the states' share was reduced to 9.4 percent, the amount of state direct purchases. The states were the ultimate consumers that actually suffered harm. Again, overturning Illinois Brick would have changed the decision.

In the Liquid Asphalt case, my office sued six producers of liquid asphalt for fixing prices and rigging bids to the state for highway projects. We sought damages for overcharges on maintenance and construction projects. The state bought asphalt to repair and maintain highways directly from the manufacturers, the defendants. However, Alabama bought larger quantities of liquid asphalt to build roads from contractors, that is, indirectly. Chief Judge Varner of the Middle District of Alabama dismissed the federal and pendent state claims for overcharges on asphalt used for construction based upon the Illinois Brick case. Ultimately, my office recovered $230,000 for the state and its political subdivisions. I believe that if it were not for the Illinois Brick rule, we could have recovered substantially more.

Finally, my office has brought suit for the state against cement manufacturers in the Cement Antitrust Litigation. Our complaint, along with others in this multidistrict litigation, charges that the cement producers conspired to fix, raise and stabilize the price of cement. Alabama spends millions of dollars every year on public buildings, highways and bridges, and other public works projects. An expensive component of these projects is cement. If the Illinois Brick decision is not reversed, Alabama may only recover a fraction of the overcharges.

These four examples are not isolated instances, and they clearly highlight the basic inequity of the Illinois Brick decision.

Alabama purchases thousands of items annually, only a small portion of which are bought directly from the producers. In most instances, the state purchases goods from wholesalers or retailers who act as middlemen between the producer and the consumer. Assuming that the producers fix the price, and sell goods to middleman at an inflated price, each successive middleman can pass on the inflated price with impunity, ultimately to the state. The middlemen do not fix the prices and therefore are not liable, while the guilty producer is shielded from civil antitrust liability because of its close business relationship with the wholesalers and Illinois Brick rule. The middlemen, the direct purchasers, have no incentive to sue their own suppliers, especially since they can pass on the overcharges to consumers. The state, as an indirect purchaser, pays the inflated price, cannot pass it on and after Illinois Brick can not sue.

This Act will eliminate the inequities of the current law and greatly benefit the state and the taxpayers who ultimately bear the burden of any inflated prices the state must pay. Senate Bill 915 as amended, will not unnecessarily spawn litigation but will instead encourage consolidation. The Act is limited in its application. Only state and United States Attorneys General may bring these actions. The Act affects only Section One actions. Finally, there is no risk of multiple liability, the bill specifically prohibits duplicative amounts from being awarded. Under this Act, defendants are entitled to assert in any action, that all or part of a plaintiffs' damages were passed on and a state or U.S. Attorney General may bring an action. Notice must be given to officials entitled to maintain indirect actions, and this bill provides that they may intervene. This encourages a single lawsuit consolidating all claims and apportioning damages fairly. A consolidated action is more effecient in that the time of judges, lawyers, parties and witnesses will not be wasted attending multiple proceedings. Further, the likelihood of multiple proceedings is great if this Act is not passed because each successive purchaser or middleman could sue only the entity directly above him in the chain of distribution. Such a procedure unnecessarily complicates antitrust actions and creates the real possibility of conflicting judgments.

Finally, I believe that this bill will not complicate the procedures followed in civil cases. As I have pointed out, S. 915, as amended, limits the plaintiffs who may sue to state and federal Attorneys General. This Act will not spawn huge unwieldy class actions. The plaintiffs authorized by the Act to sue for indirect purchases may represent essentially two types of classes, depending on the statutory and the common law powers of the Attorney General. In Alabama, as the Attorney General, I may represent the state and a class of political subdivisions and public entities, such as cities, counties and agencies. I may also represent the citizens of Alabama in a parens patriae capacity. My office has filed numerous lawsuits based upon these two theories. As a consequence of this long history, Alabama courts are experienced in managing these cases, and they do so fairly and expeditiously.

I believe that Senate Bill 915, as amended, is essential to the welfare of the state of Alabama and its citizens. It will again allow the state to protect itself and its citizens against antitrust violators. This bill remedies the inequities of Illinois Brick decision and at the same time will streamline antitrust litigation. I hope you will agree that this bill is in the best interest of the states and our citizens.

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